TRANSCRIPT OF RECORD

(25,582)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 752.

HARVEY WATTERS, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1916.

1 The Supreme Court of the State of Michigan.

HARVEY WATTERS, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN, Defendant in Error.

RECORD.

2 STATE OF MICHIGAN:

Supreme Court.

PEOPLE OF THE STATE OF MICHIGAN, Appellee,
vs.
HARVEY WATTERS, Defendant and Appellant.

Error to the Circuit Court for the County of Alger.

Record.

Complaint.

STATE OF MICHIGAN,
County of Alger, ss:

The complaint and examination on oath and in writing of E. W. Sullivan, taken and made before me, Gilbert S. Meeker, a Justice of the Peace of the City of Munising, in said County, upon the 9th day of July, A. D. 1915, who being duly sworn, says that heretofore, to-wit: on the 8th day of July, A. D. 1915, at the City of Munising and in the County aforesaid, that Harvey Watters, a resident of the City of Ishpeming, in the State of Michigan, on said last mentioned day and on divers other days between last mentioned date and the first day of May, 1915, did go about the streets of the City of
3 Munising, within the corporate limits of said City, and did engage in peddling goods, wares and merchandise from house to house in said City and did canvass and take orders from house to house in said City of Munising for the sale of goods, wares and merchandise, to-wit: Tea, coffee, spices and other goods and wares, and did so go about said business and the taking of said orders from house to house in said City of Munising with a horse and wagon and on foot; he, the said Harvey Watters, not being a resident of the City of Munising, and not having paid and received any city license for carrying on said business in violation of Ordinance No. 14, being an ordinance relative to the sale of goods, wares and merchandise in the City of Munising, now incorporated into the City of Munising; he, the said Harvey Watters, not having paid the license fee required for carrying on said business to the City Clerk of said City, contrary to the form of the Statute in such case made and pro-

vided, and against the peace and dignity of the People of the State of Michigan; whereof the said E. W. Sullivan prays that said Harvey Watters may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require.

E. W. SULLIVAN,
City Clerk.

Taken, subscribed and sworn to, before me, the day and year first above written.

GILBERT S. MEEKER,
Justice of the Peace.

The said Complaint was filed July 9th, 1915.

Plea.

The defendant stood mute and the said Justice of the Peace entered a plea of not guilty.

4 *Bill of Exceptions.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Alger.

PEOPLE OF THE STATE OF MICHIGAN, Appellee,
vs.
HARVEY WATTERS, Defendant and Appellant.

At a session of said court, held at the Court House in the City of Munising, in said County, on the 22nd day of October, 1915, before Hon. Louis H. Fead, Circuit Judge. The above entitled cause, which was an appeal from Justice Court, where the defendant stood mute and the Justice entered a plea of not guilty, was brought on for trial before the Circuit Judge, without a jury, the jury being expressly waived by said defendant, and the parties being in court by their attorneys, the People by D. E. Simmons, Prosecuting Attorney for said County of Alger, and the defendant by W. T. Potter, his attorney, produced evidence as follows:

HARVEY WATTERS, defendant, on consent of counsel, was sworn on the part of the People, testified as follows:

Mr. Potter: The defendant objects to any evidence being introduced in this case, on the ground that the ordinance hereinafter mentioned is invalid in so far as it affects those engaged in interstate commerce, because it is in violation of Section 8, of Article I of the Constitution of the United States, which vests in congress the power to regulate commerce among the several states.

Second, the complaint describes the defendant as a non-resident,

and that the ordinance in question contains no provision as to non-residents.

5 Third, that the statute organizing villages of this state did not authorize the Village of Munising to pass the ordinance in question.

Objection overruled and exception taken.

I live in Ishpeming, Michigan. I am a salesman or solicitor for the Grand Union Tea Company. My method of selling goods is that I take orders one month and deliver the next. I work on commission, so much percentage. On July 8th, 1915, I was taking orders and delivering goods on that day.

Q. And you had been doing the same in the City of Munising previous to that time?

A. Yes, sir.

Mr. Potter: I object to that only as an explanation. I think the prosecutor should elect his dates.

Court: I presume you elect the date mentioned in the complaint, don't you?

Mr. Simmon: We do, yes, sir.

On that day I was delivering at the time I was arrested, orders that had been taken the previous month, thirty days or more than that previous and I was taking orders for the month after. My method of selling goods is to go from house to house. I sell at retail. In about a week or two after I take the orders, I turn them in to the manager of the Grand Union Tea Company. These particular goods that I delivered on the 8th had been sent down to me at one time and I had the goods in my ware-house at the time. I deliver so much goods one day and there are so much goods left for the next day to deliver; that is about the only way I can explain it. I have to have a place to keep them if I am away for two or three days. I send the orders to be filled to the Ishpeming store. I do not send the orders by mail. I take them back and turn them over to the manager, Mr. Kay, and he and his help fills them.

I have been doing business for the Grand Union Tea com-
6 pany for about eight years, off and on. My territory is comprised of Ishpeming and surrounding country and Munising. My Company has a number of men employed the same as I am in the Upper Peninsula. I do not exactly know what counties.

When I delivered goods on the 8th of July, I collected for the goods delivered and only on delivered. I keep the money until I return to Ishpeming, take out my commission and return the balance to the Grand Union Tea Company. I do all my work on commission.

On this particular day I did not apply for nor pay for or receive a license in the City of Munising.

Q. These goods that you received upon that date, did you receive them on the 8th from the Grand Union Company—were they shipped to you from Ishpeming?

A. They were shipped to me from Ishpeming, but I don't know

exactly what day. I think about the 5th or 6th they reached here; I couldn't tell to the date, exactly.

Q. Addressed to you, were they?

A. Addressed to the Grand Union Tea Company, in care of me.

I employ a rented horse and wagon for delivery and did on July 8th. I rented it from Carmody, a liveryman in Munising. I always do business that way in Munising. I have been doing business in Munising since last November, hardly a year.

Q. Now, what kind of a store is kept by your Company in Ishpeming?

A. Well, a regular store. They keep a retail stock in front, and bags of coffee and stuff like that in the back.

Q. Bags of coffee, and chests of tea?

A. Yes, they are put up by the agent.

Q. What do you sell?

A. We sell tea, coffee, baking powder and spices, principally.

7 Court: I don't understand that. You say they have a retail department in front, and bags of coffee and tea in the back?

A. Yes, where they put up the stuff they ship to us.

Court: You mean they take them out of the bags, tea and coffee, and put them into something else?

A. Yes, put them into something else and match them up for us.

Q. These goods that are in the Ishpeming store, from which your orders are made up, come to the Ishpeming store in bulk, do they not?

A. Yes, sir.

Q. And they are put up in packages there in the store, are they not?

A. Yes, sir.

Q. And are sent to the collectors in different parts of the Upper Peninsula?

A. Yes, sir.

As to the retail department of the Ishpeming store, I don't know whether they get their goods from the general bulk or not, as I am only in the store a very small part of the time. I don't know how long the goods are in the store from which my orders are made up. I think they pack goods there every day for all the orders as they come in from the solicitors. I think the store gets their goods from Brooklyn, N. Y., but I don't know for sure.

Q. How long a time elapses between the time of your taking orders and the time of the delivery of those same goods?

A. Oh, about thirty days. It might run a couple of days over, just about that, approximately speaking.

Q. These goods that are shipped to you, are they directed to your customers—are the customers' names on the goods?

A. No, sir.

8 Q. For instance, if you have six packages of coffee, six pounds of coffee sent to you, if you have taken orders for six pounds in the City of Munising, these six pounds would be sent to you done up in six separate packages?

A. Yes, separate pounds, the way I ask for them in my order.

Q. But the Ishpeming store would not know the names of your customers?

A. They would not.

Cross-examination.

By Mr. Potter: The paper you show me headed "This Agreement" is the one I had with the Company. It was offered in evidence and marked "Def. Ex. I."

The paper you show me is the bond I gave the Company as a solicitor. It was offered in evidence and marked "Def. Ex. 2."

Q. Now, as I understand, all the goods you delivered July 8th you had taken orders for at least thirty days prior thereto?

A. I did, yes, sir.

Q. You delivered no goods on July 8th for which you took orders on that day?

A. No, sir.

Q. And all the orders you took on July 8th would not be delivered before August 7th or 8th?

A. No, sir.

Q. These goods that were shipped to Munising were shipped in one big package, were they, one box?

A. One or more.

Q. How were they marked?

A. They were marked Grand Union Tea Company, care of Harvey Watters, Munising, Michigan.

Q. You state that the goods were shipped to Ishpeming
9 in bulk from New York. You mean that, the coffee comes in sacks?

A. Yes, and tea in chests, and soap in boxes.

Q. And other articles in ordinary packages that goods are shipped in?

A. Yes, sir.

Q. Now, on July 8th, or prior thereto, did any goods for which you had taken orders on previous dates—if those goods were not accepted by the consumer, then, as I understand it, they are always returned by you to the manager, Mr. Kay?

A. Yes, they were; I always turned them over to Mr. Kay.

Q. On July 8th, you didn't sell any goods direct to a consumer which had been refused on that same date?

A. No, sir, no, sir, I did not.

Q. Now, the quantity of goods in the rear of the Ishpeming store, or basement—that was a basement?

A. Yes, sir.

Q. Depends a good deal on how the freight comes in?

A. Yes, sir.

Q. If you happen to be there the date the freight comes in there is apt to be quite a quantity of goods?

A. Yes, sir.

Q. And in a few days it is practically gone?

A. Yes, I have seen only one bag of coffee left more than once.

Q. These goods, and papers, and all the documents that you have, state whether or not they belong to the Grand Union Tea Company?
A. They do, yes, sir.
Q. Everything that you have?
A. Everything that I have.
Q. And all the goods delivered by you belongs to the Grand Union Tea Company until they are actually delivered to the consumer?
A. Yes, sir.

Redirect examination.

By Mr. Simmons:

Q. On this day you made these deliveries, you took orders at the same time?
A. Yes, sir.
Q. For other goods to be delivered at a future date?
A. A month from that date, about.
Q. Did you deliver those a month from that date?
A. No, I don't think I did, not at that time, no, I didn't. I didn't come down.
Q. You didn't deliver those orders?
A. No.
Q. You have since delivered goods in the city here?

Mr. Potter: I object to anything that happened since then. I have no objection to stating to the Court that he paid two or three licenses under protest, but I object to it as absolutely immaterial, and I only make the statement to the court.

Court: Well, that won't prejudice the court much.

C. F. KAY, sworn on behalf of the defendant, testified as follows:

I live in the City of Ishpeming. I am local manager of the Grand Union Tea Company. I have been its manager at the City of Ishpeming about a year and a half.

The Grand Union Tea Company is a New Jersey corporation. It is organized for the purpose of selling goods that are manufactured by Jones Brothers, a New York corporation. I have worked for the Grand Union Tea Company about three years.

11 I know Harvey Watters. The Ishpeming store employs eleven solicitors at the present time. I had nine at the time this case was tried in Justice Court.

In Ishpeming the Grand Union Tea Company has what we may term a double store. The front store is used for retail purposes only, and the rear and basement is used to match orders from the several solicitors. In the retail store we sell entirely over the counter to the retail trade only, and to only such people as come into the store.

Mr. Watters was working for the Grand Union Tea Company when he was arrested in Munising in July of this year. For deliveries that he was making on July 8th he would take the orders, as I remember it, on June 6th or 7th, practically a month prior to delivery. That

is true in the general run of business. The solicitors orders are taken one month before delivery. Generally speaking, none of the goods that were delivered on July 8th by Mr. Watters were in the State of Michigan on June 7th or 8th, at the time Mr. Watters took the orders for the goods. It generally takes two weeks to have an order filled from the State of New York.

Q. How long does it generally take to get the orders from the State of New York?

A. Well, it takes approximately two weeks. There are exceptions to that, principally in the early and late seasons, when shipments cannot be relied upon, at those times we often get shipments doubled; we double up.

Q. That is, it takes longer at those times?

A. Yes, and under ordinary circumstances the goods will come through in two weeks.

When Mr. Watters was taking orders for goods in Munising on July 8th, for delivery August 8th, none of the goods for which orders were taken on July 8th, were in the State of Michigan on that date. I order goods on Tuesday of each week from Brooklyn, N. Y., and ordinarily those goods will be received in Ishpeming in two weeks.

12 Q. What were the instructions by you or by your company, to Mr. Watters, if an order of goods received on June 8th, to be delivered on July 8th, was refused by the person who made the order?

A. Those goods were returned to the store and placed in the retail department.

Q. Who places them in the retail department?

A. The party checking them in, usually me, because it is a case of settlement with the salesman.

Q. Does that frequently happen, that the goods are returned to you and put in the retail department?

A. In the Munising location it happens every month; there has not been any exception since Mr. Watters came to Munising.

Q. Do those goods ever get into the solicitor's department again?

A. No, sir, they never leave the retail department.

Our instructions to solicitors are that no goods shall be sold directly from the wagon, as that constitutes hawking or peddling. Our instructions are to make no deliveries until at least four weeks after the order is taken.

Q. Now, those goods you say you order them from Brooklyn, New York. Now how do they come—how does the tea come, for instance?

A. The tea comes in chests and half chests and boxes.

Q. And the coffee?

A. The coffee comes in what is known to the Railroad Company as double bags, weighing 100 pounds. Ordinarily they are in bags of 200 pounds each.

Q. As soon as they are placed in the Ishpeming Store, what is done?

A. The boys immediately commence to pack the goods and get them ready for shipment.

Q. Do you have a considerable amount of goods on hand in the solicitor's department at any time?

13 A. That depends on the time. On the day of the receipt of the freight we would have several dray loads, but a week from that time we would have practically nothing. The stock would be reduced to the minimum.

Q. And when you receive no freight from Brooklyn, New York, whether or not as a rule, the solicitor's department is practically empty?

A. Yes, sir.

Q. You receive the orders from the solicitors in detail, do you? Mr. Watters would give a detailed order of what he had sold in Munising?

A. Yes, the number of different kinds of tea, and total.

Q. You don't mark the name of the individual purchaser?

A. No, sir.

Q. But you put them up in the smaller packages?

A. I put them up in any size packages the customer buys.

Q. And these are sent how?

A. They are boxed together and shipped to the Grand Union Tea Company in care of Harvey Watters, Munising, Michigan.

Q. Who owns those goods until they are delivered to the consumer?

A. The property of the Grand Union Tea Company.

Q. Just describe the I-hpening store, how it is partitioned, or did you describe that?

A. In front is the retail department.

Q. Is there a partition between that and——

A. Yes, it is about half way back. The rear room is used for matching orders for the solicitors, only. The retail department is only in the front of the store.

Court: You use the term "matching orders." What do you mean by that, putting up orders?

A. Putting up the orders, yes, sir.

Court: That is, you take the solicitor's list?

A. We take the solicitor's list and stamp the bags for it.

14 The bags are stamped net weight and the kind of tea or coffee the bag contains.

Court: And then you put them in a box?

A. Then, after the bags are filled, they are boxed up, yes, sir.

Q. How long after the solicitor makes his order does he turn in the list of the orders to you?

A. Why, it is usually about two weeks.

Q. State whether or not in the experience of yourself or the Company, you anticipate about what orders the solicitor will make, and order the goods from Brooklyn beforehand—before you have actually received the orders from the solicitor?

A. Yes, we anticipate what we are going to get, and the goods are ordered prior to the date of our receiving the orders from the solicitor.

Q. And those goods are all ordered from where?

A. From Brooklyn, New York.

Q. How long do those goods remain in the store, that you get from Brooklyn, New York—in the solicitor's department?

A. About one week.

Q. Whether or not just long enough to——

A. Yes, long enough to match up the orders, yes, sir.

Q. And the day that you get the freight in you have quite a quantity on hand, and before the next freight is in it is practically exhausted?

A. Yes, sir.

Cross-examination.

By Mr. Simmons: I have been in Ishpeming about a year and a half, working for this Company as manager of this store. We don't do a wholesale business. I am manager of both the solicitor's and retail department. I have two clerks in the store but they have nothing to do with the solicitors. They work not only in the retail department but assist in the matching up in the solicitor's department.

Our store is assessed in Ishpeming and there is a tax on the stock and fixtures, and horses and wagons.

On July 8th we had nine solicitors. These goods were shipped from Ishpeming on July 3rd and arrived in Munising on July 6th. We order these goods from Brooklyn. We order every Tuesday; just once a week; it is an iron-clad rule of the Company that we can only order once a week. All these goods we sent to Munising. We must have received them in Ishpeming by the latter part of June. They were not all ordered in the same shipment.

Q. You stated that you anticipate about how much these solicitors will take orders for, and order so much per week?

A. Yes, sir.

Q. So that you couldn't positively state that those particular orders that were taken and were delivered on the 8th day of July, were all out of the State of Michigan at the time the orders were taken, could you?

A. Within a few possible exceptions, yes, sir.

Q. You said "generally speaking," in your direct evidence?

A. Well, generally speaking. There might be an occasional exception. We might anticipate certain orders from this location, and there might possibly be a case of baking powder left over from a previous order.

Q. They sometimes occur—often?

A. Well, not often, but it sometimes occurs.

Q. And agent might have a particularly good week in taking orders, and on the other hand he might have a particularly bad week?

A. That is sometimes true.

Q. So that it would be impossible in your anticipation of orders, to figure out the exact amount?

A. Well, you couldn't figure the exact amount, no sir.

16 These orders from Mr. Watters for delivery came in the store with other orders for other solicitors in different parts of the Upper Peninsula.

Redirect examination.

By Mr. Potter:

Q. Now, you say with possibly one or two exceptions. State whether or not the goods that were delivered on July 8th were received by you in Ishpeming after June 9th?

A. They were, yes, sir.

Court: Do you mean that with some exceptions, or without any exceptions?

Mr. Potter: He said occasionally there is an exception, on a can, or something like that.

Q. I suppose it would be impossible for you to say absolutely, there might not be a can of baking powder, or something of that kind?

A. Yes, that is the case.

Q. Now, with regard to these orders, you have checked these over, and found that substantially everything arrived in the State of Michigan after June 9th?

A. I have, yes, sir.

Q. What were the one or two little exceptions that you spoke of?

A. Why, we have toilet cream, and toilet cream being a new item of merchandise, and sold at retail in the tea business, it is very seldom that an order was taken for it. In this particular case there happens to be two cans of toilet cream that was included in this order, that were not among the orders that were received after the orders were taken.

Q. And your general business is tea, coffee, soap, extracts and baking powder?

A. Yes, sir.

17 Q. Were those all outside of the state at the time the orders were taken?

A. Yes, sir.

Q. What counties are covered by your department, do you remember?

A. Chippewa, Schoolcraft, Luce, Marquette, Iron, Alger, Baraga and Mackinaw.

Q. Whether or not the solicitors work only upon percentage?

A. Percentage only, yes, sir.

Recross-examination.

By Mr. Simmons:

Q. Now, you always have some tea and some coffee on hand in your solicitor's department, do you not?

A. We always have some, yes, sir.

Q. It would be impossible for you to do business and not have a small amount on hand to meet emergencies?

A. Yes, sir.

Redirect examination.

By Mr. Potter:

Q. Now, don't you occasionally run out of coffee for some time, and have to hold up an order before you can fill it?

A. We have, at the present time, not 100 pounds of coffee in our solicitor's department.

Q. What I mean is, whether or not you don't have to hold back an order?

A. Yes, we are holding them at the present time.

Court: Well, do you ever run out entirely?

A. Not entirely.

Q. Not entirely, but in some things do you?

A. Yes, in some things, we are at the present time.

18 Mr. Potter: That is our case.

Mr. Simmons: We would like to introduce the ordinance of the city.

Mr. Potter: I have no objections to that, subject to the objections I have put in.

Mr. Simmons: That is Ordinance No. 14.

Mr. Potter: Ordinance No. 14, which was adopted July 13, 1900.

Mr. Simmons: There is an amendment, but nothing is claimed for it.

Mr. Potter: Yes, there is nothing claimed for the amendment.

HARVEY WATTERS, recalled on behalf of the People, examined by Mr. Simmons, testified as follows:

Q. What was the total amount of money received by you on this particular day, July 8th?

A. You mean taken for the following month?

Q. No, that you delivered and collected money for?

A. I couldn't tell because I didn't keep track of it.

Q. Would you say there were forty or fifty dollars?

A. Yes, maybe thirty-five or forty dollars, perhaps, just about that.

Q. Just around about thirty-five dollars, approximately that?

A. Yes, sir.

Mr. Simmons: I don't suppose there is any question about this being a municipal corporation?

Mr. Potter: No, I won't quarrel with you about that, about it being either a city or village.

We raised the objection here, and in the court below, that they counted upon Watters as a non-resident, and that is fatal.

Mr. Simmons: Well, the ordinance says any person.

It is admitted that the price received for the two cans of
19 toilet cream by the defendant was fifty cents or twenty-five cents per can.

It is admitted that the total deliveries by the defendant on July 8th, and for which he received payment was $66.75.

It is admitted that the City of Munising has adopted all the ordinances of the Village of Munising, and that Ordinance No. 14 is now in full force and effect.

Thereupon the court took the case under consideration and on November 23rd, 1915, rendered the following written opinion in the case.

The Circuit Court for the County of Alger.

THE PEOPLE
vs.
HARVEY WATTERS.

The respondent was tried in Justice's Court for the offense of peddling in the City of Munising on, to-wit: July 8th, 1915, contrary to the provisions of Ordinance Number 14, of said City. He was convicted in Justice Court and appealed to the Circuit Court, where a trial was had at the October term before the court, the respondent having waived a jury.

Statement of Facts.

The Grand Union Tea Company is a New Jersey corporation, with headquarters at Brooklyn, N. Y., formed for the purpose of selling goods handled or manufactured by Jones Brothers of New York. It rents a building in Ishpeming, Michigan, in the front part of which it conducts a retail store. In the back part of the building and in the basement, it conducts what is called a solicitors' department, in which it handles tea, coffee, soap, baking powders, spices, toilet preparations, etc., the first four articles constituting its principal business.

The retail department of the store is separated from the solici-
20 tors' department by a partition, doors leading from one to the other. Both departments are under the control of one manager and there are employed in the retail department two clerks, who also assist in the solicitors' department in putting up the solicitors' orders. The Company pays taxes in Ishpeming on its stock, fixtures and wagons.

In July last, the Company had nine solicitors, each having his own territory to cover. The respondent was one of such solicitors and his territory included the City of Munising. He worked on commission, under a written contract with the Company, "as its salesman to solicit orders for and deliver goods, wares, merchandise, etc., in such place or places as first party shall designate." Under such contract all goods belonged to the Tea Company until they were delivered to the purchaser. Collections were made at the time

of delivery and the respondent gave bond to pay for all such goods delivered, less the amount of his commission thereon. The respondent solicited orders from house to house in Munising, for delivery a month later. So far as shown, he delivered no goods at the time the orders for them were taken and he sold no goods from his wagon, except upon the prior order.

To trace the particular transactions complained of: it appears that on June 6th or 7th, the respondent took orders from various parties in Munising for certain articles, including teas, coffees, toilet creams, etc. The orders were noted by respondent on an order book which he retained for his own use and which he did not turn in to the store, but which, under his contract, was the property of the Company. Thereafter, and about ten days or two weeks later, he turned in to the Ishpeming manager a commission bill of his orders, such commission bill being a statement in the aggregate of the goods he would need to fill the orders he had taken. The amounts of the separate customers' orders or the customers' names were not reported to the manager nor sent to the Company. The orders taken in June were for July delivery.

21 Each Tuesday the manager estimated the goods necessary to fill the orders, which experience had shown him would be liable to come in, and sent an order to Brooklyn for the amount of such goods. The goods arrived in Ishpeming, about two weeks after the order was sent. They came in bulk, the tea in chests, the coffees in bags, etc., without specific designation in any way, consigned to the Grand Union Tea Company at Ishpeming. The manager and the clerks then put up the bulk goods into pound packages and filled the solicitors' orders therefrom. The respondent's June order at Munising was packed into one or two large boxes and shipped to Munising to the Grand Union Tea Company in care of respondent. There was nothing to indicate that any particular package belonged to any particular customer. The goods were shipped from Ishpeming on July 5th or 6th and, upon July 8th, at Munising the respondent opened the boxes, loaded the goods upon a wagon, hired from a livery stable, and made his individual deliveries, collecting for the goods upon delivery. He also took orders at such time for delivery the next month. In case goods were rejected by customers, as frequently happened, they were returned to Ishpeming and put into the retail department of the store for sale.

In the course of the conduct of the business at Ishpeming, the solicitors' department is filled with goods upon the arrival of freight from New York. Directly thereafter, the solicitors' orders are filled so that the stock is greatly depleted. Sometimes the department runs out of certain articles, but at no time is it entirely empty. There are always some tea and coffee on hand and frequently other articles. Sometime prior to June, the manager, anticipating a fair sale of toilet creams, ordered an amount thereof and such creams were on hand in the solicitors' department in June, when respondent took his order, and two cans of toilet cream were included in respondent's July delivery in Munising, the orders for them having been

22 taken in June. So far as can be traced, no articles included in respondent's June orders and July delivery at Munising

were in the state when the orders were taken, except the two cans of toilet cream.

It thus appears that the manager did not order from Brooklyn upon the direct basis of the solicitors' orders, but merely estimated the amount which he thought would be necessary to fill such solicitors' orders during the week the goods would arrive from New York. And because of error in his estimates, he sometimes had goods left over, which remained and were included in subsequent solicitors' orders. The surplus goods do not seem to have been transferred to the retail department. The estimated amount of goods left over each week after filling the orders was not shown.

Conclusions of Law.

Several technical objections are raised by respondent to the form of the complaint and warrant. These objections, in my opinion, should have been raised before pleading. As they were not raised until after the respondent had pleaded not guilty and after a witness had been sworn in the Circuit Court, they are waived. In any event, the statute of amendments would cover them.

Respondent claims the ordinance under which the complaint is laid, does not cover the case at bar for the reason there is no authority in the "Powers of Council" in villages to require a license from people who "canvass from house to house for the sale of property on subscription." Sec. 2769 C. L. 1897. The ordinance in question was adopted while Munising was still a village. Such section authorizes the council to "license hawkers and peddlers" and the argument is that, under the great weight of authority, the word "peddler" means one who carries his goods with him for immediate delivery upon sale.

A municipality, within constitutional limits, may be granted such powers of licensing itinerant vendors as the legislature may
23 see fit to give it. And if words, written into a village charter, which is a state law, have an accepted meaning in this state, the legislature is deemed to have intended them to be construed according to that meaning. In such a case, the definitions of other legislatures or courts do not control. The Federal Courts must accept the construction put upon a state statute by the state courts. They must, therefore, accept the construction of a village charter granted by the legislature, as laid down by the state courts. In this state, the word "peddler" includes those persons who go from house to house taking orders for future delivery.

City of Alma vs. Clow, 146 Mich. 446.
People vs. Sawyer, 106 Mich. 429.

Respondent seeks to distinguish Alma vs. Clow on the ground that the ordinance there in issue defined "hawker and peddler." The ordinance in the instant case covers persons who "canvass from house to house for the sale of property on subscription" and may thus be deemed to so define a peddler. But, aside from that, the mere fact

the council in Alma vs. Clow defined a peddler is of no consequence in determining the class of persons included within the meaning of the term for the reason that the council has not the power to prescribe new definitions for terms which already have legal significance.

Allport vs. Murphy, 153 Mich. 490.

The principal contention of respondent is that he was engaged in interstate commerce and the ordinance is unconstitutional as far as it affects such acts.

It appears, however, that the respondent took orders for some goods which were within the state when the order was taken, which had been shipped into the state without previous order therefor, and which were being held in the state for the purpose of sale to the public. As to such goods, the respondent, and his employer, were engaged in intrastate commerce.

People vs. Bacon, 227 U. S. 504.

24 18 L. R. A. N. S. 134, note.

19 Cyc., 1231.

Lange Medical Co. vs. Brace, 22 D. L. N. 535.

Nevins vs. Worthington, 150 Mich. 580.

Imperial Curtain Co. vs. Jacob, 163 Mich. 72.

Where part of the transaction is purely an act of interstate commerce, still the state power over the separable internal part of the matter is unaffected.

7 Cyc. 441, and note.

The respondent was, therefore, guilty of peddling within the provisions of the ordinance.

Counsel have urged a determination of the question of the general character of the business of respondent's principal, shown above, as to being intra or interstate commerce, for future guidance, but as the determination of this question is not necessary to the decision of this case and the full texts of the authorities cited are not available to the court at this time, a discussion rather in the nature of dicta, than of adjudication, would be all that could be attempted. The discussion must necessarily be based upon the full reports of but few cases and upon the more or less incomplete excerpts given in the briefs.

After consideration of the cases cited so far as available and the excerpts quoted, it appears that the general character of the business of respondent's principal in the solicitors' department is interstate commerce.

It seems to be laid down definitely in the cases.

1. That the negotiation of the sale of goods which are in another state, for the purpose of introducing them into the state where negotiation is made, is interstate commerce.

2. The interstate character of a transaction is not affected by the fact that the goods are shipped to an agent in bulk and the packages broken for the purpose of distribution.

Robbins vs. Shelby Co. Tax Dist. 120 U. S. 489.

Re Spain, 14 L. R. A. 97.

Dozier vs. State, 218 U. S. 389.

Crenshaw vs. Arkansas, 227 U. S. 389.

25 3. That the party may be engaged also in intrastate commerce, by the maintenance of a warehouse from which he sells goods directly, or that he sometimes makes sales direct from the car, does not destroy the interstate character of goods delivered from the car upon previous orders taken when they were out of the state.

Stewart vs. Michigan, 232 U. S. 655.

4. Nor does it affect the transaction that, after being taken from the cars into which they are carried into a state, some work is necessary to put the goods in shape for delivery. As, for instance, putting pictures into frames, where both came in the same shipment but were separately packed in bulk. Caldwell vs. North Carolina, 187 U. S. 622; or, to stop corn meal in transit merely for the purpose of grinding and sacking it.

Cos vs. Erroll, 116 U. S. 517.

The rule is thus stated in 18 L. R. A. N. S. 134, note:

"Where goods are shipped into a state for some purpose other than that of being thereafter offered to the general public for sale through the mediation of agents in the employ of the foreign corporation, such goods do not lose their character as articles of interstate commerce as to render their sale a doing of business within the state."

See also Kelly vs. Rhoades, 188 U. S. 1.

5. There need not be an actual or specific appropriation of any particular goods to any individual order to maintain the character of the transaction. In addition to the cases cited, see Davis vs. Virginia, decided by the Supreme Court of the United States on April 15th, 1915, where it appeared that, with an order for an enlarged picture, the customer was to be given an opportunity to purchase a frame at a certain price. The pictures and frames were shipped to an agent in bulk and upon delivery of the picture, the agent offered the purchaser his choice of three frames then shown him. The court held the offer was a part of interstate commerce.

These propositions and the cases cited, cover all the ques-
26 tions raised by counsel or which have suggested themselves to the court, except one. In all the cases where full reports were available, it appears that the orders obtained from the customers had actually been sent out of the state to be filled. In the case at bar, only the respondent knew who the customers were, neither the manager at Ishpeming nor the principal being apprised of the individual orders. I do not deem that of controlling import, however. To constitute interstate commerce, the orders need not be in writing nor, as seen, need they be filled and shipped as individual orders, either to the customer or to the agent. Respondent, under his contract, was the alter ego of the Tea Company, selling its goods, and the individual orders would not have been of use to the principal as the agent collected upon delivery of the goods nor would they have gained any legal force by reason of the agent making a detailed statement of the particular customers' names and orders.

The fact that the goods were left over in the solicitors' department each week after filling the orders might be of considerable importance if it were shown that such goods amounted practically to a continuous stock on hand.

Dated November 23, 1915.

LOUIS H. FEAD,
Circuit Judge.

Thereupon the court took the case under further consideration and on the 24th day of January, 1916, he found said defendant guilty of said offense charged in said complaint and sentenced the said defendant to pay a fine of ten dollars and costs, amounting to twelve dollars, within twenty-four hours, and in default of the payment of the said fine and costs, that the said Harvey Watters be confined to the common jail of this county until such fine and costs are paid, not exceeding thirty days from and including this day.

And inasmuch as the said several matters so produced and
27 given in evidence, do not appear by the record of the said trial and verdict, counsel for said defendant did then and there propose the aforesaid exceptions to the ruling of the said Circuit Judge in the trial of said case and have requested him to sign this bill of exceptions, containing the several matters aforesaid, pursuant to the statute in such case made and provided, and thereupon the said Circuit Judge, at the request of counsel for said defendant, hath signed this bill of exceptions, pursuant to the statute aforesaid, within the time allowed for that purpose, and does hereby certify that the foregoing contains the substance of all the material evidence offered and given by the respective parties at the trial of said cause, and of the rulings relating thereto, and the exceptions thereon, and further certifies that it is necessary to set forth by question and answer so much of the testimony as has been to set forth in the bill of exceptions, in order to obtain a clear understanding of the issues involved in the case and that this bill of exceptions has been made sufficiently full and complete so that the Supreme Court on writ of error may, by going over the same, be able to make an examination of the entire case.

Dated this 2nd day of March, 1916.

LOUIS H. FEAD,
Circuit Judge.

28 STATE OF MICHIGAN:

The Circuit Court for the County of Alger.

THE PEOPLE OF THE STATE OF MICHIGAN, Appellee,
vs.
HARVEY WATTERS, Defendant and Appellant.

Defendant's Assignments of Error.

Now comes the said defendant, by W. T. Potter, his attorney, and says there is manifest error in the record, trial and proceedings in said cause in the following particulars, to-wit:

1. The court erred in admitting any evidence to be introduced in the case for the reason that the ordinance in question is invalid insofar as it affects those engaged in interstate commerce, because it is in violation of Section 8, of Article 1, of the Constitution of the United States, which vests in Congress the power to regulate commerce among the several states.

2. The court erred in holding that the business conducted by the defendant at the time of his arrest was not interstate commerce.

3. The court erred in refusing to hold that the defendant at the time of his arrest was engaged in interstate commerce.

4. The court erred in finding the defendant guilty of the charge set forth in the complaint.

And for the errors aforesaid, the defendant says, that the verdict and judgment entered in said cause should be reversed, set aside and held for naught.

W. T. POTTER,
Attorney for Defendant.

29 DEFENDANT'S EXHIBIT 1.

1. This agreement, made this seventh day of August, A. D. 1914, between Grand Union Tea Company, a corporation organized and existing under and pursuant to the laws of the State of New Jersey, party of the first part, and Harvey Watters, of Ishpeming, in the County of Marquette and State of Michigan, party of the second part, witnesseth:

2. Whereas, first party is engaged in the business of selling, at retail, teas, coffees, baking powder, spices, extracts, chocolate, cocoa, soap and other sundry merchandise, and in connection therewith the giving to its customers of profit sharing or premium checks, and premiums, and

3. Whereas, said second party is desirous of entering the employ of first party as salesman for the sale of merchandise so kept and sold by first party in the manner and upon the terms hereinafter stated.

4. Now, therefore, it is agreed by and between the parties hereto that first party does hereby employ second party, subject to his furnishing a bond as hereinafter provided, as its salesman to solicit orders for and deliver goods, wares, merchandise, etc., in such place or places as first party shall designate, and agrees to pay second party such compensation as may from time to time be agreed upon, and the second party hereby agrees to enter upon such employment upon the terms and conditions herein stated.

5. It is understood and agreed that second party shall solicit orders for merchandise at prices and premium rates fixed by first party and in such manner as first party may designate, and enter upon cards or books furnished by first party, the names and addresses of the customers and the goods ordered by each, that first party will thereupon, in due course, deliver the merchandise, premiums and prem-

ium checks so ordered, to second party, who shall thereupon,
30 in due course, deliver the same to the customers for cash and in no other manner, and that he will, within ten (10) days after each delivery to him of such merchandise, premiums and premium checks and also on the last day of each month pay first party for all merchandise delivered by him less the compensation to which he is entitled and account for all merchandise not delivered by him and all premiums and premium checks received by him.

6. Second party shall on the last day of each month, and at any other time first party may desire, furnish first party with an itemized statement showing all merchandise, premiums and premium checks in his possession, and upon demand he shall deliver the same to first party at such place and in such manner as first party may designate.

7. It is expressly understood and agreed that the title to all merchandise, premiums, premium checks, books, cards, papers, list of customers and all documents and papers of every kind connected with said business and all knowledge and information acquired by second party in connection with said business is and at all times shall be vested in and belong to first party and second party shall acquire no interest therein or in any part thereof, and that upon the termination of this agreement he will forthwith turn over to first party all cards, books, lists and property so belonging to first party.

8. Second party agrees to use his best efforts in the interest of first party and that he will not during the life of this agreement, handle, sell or offer for sale any goods, wares or merchandise except those furnished by first party, and also that he will not, at any time, directly or indirectly divert or attempt to divert any customer or trade from said company either while in the employ of first party or for a period of three (3) months thereafter.

9. In consideration of said employment second party expressly agrees that he will, at any time during his said employment, accompanying any person designated by first party, and show
31 him the residence of all customers served by him in his said employment; for which services first party agrees to pay him $1.00 per day in addition to his regular compensation, and said second party further expressly agrees that for a period of three (3) months from and after the termination of this agreement, he will not directly or indirectly, for himself or for any other person, solicit, sell, or attempt to sell any goods, wares and merchandise similar in kind or nature to those kept and sold by first party on any route or in any territory in which he has worked for first party or to any customers or persons upon whom he has called while in the employ of first party hereunder.

10. This agreement may be terminated at any time by either party by giving the other ten (10) days' notice in writing of such termination.

11. This agreement shall not become binding until second party shall furnish and first party shall accept a bond in the sum of $500.00 with good and sufficient surety conditioned that second party, shall return or pay for all goods, merchandise, premium

checks and premiums, and other property, received by him, and shall observe all the other terms and conditions of this agreement.

12. No manager or other agent of the company has authority to alter this agreement in any manner.

13. This contract is deemed to be made when accepted and signed by the Grand Union Tea Company at its office 68 Jay Street, Brooklyn, New York.

14. In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

GRAND UNION TEA COMPANY,
By FRANK E. BUNDAGE. [SEAL.]
HARVEY WATTERS. [SEAL.]

Witness:
P. A. NEWMAN, *Sec'y.*
C. F. KAY.

(Corporation Seal.)

32 DEFENDANT'S EXHIBIT 2.

Know all men by these presents, that we, Harvey Watters, as principal, and William Andrews, as surety, of the County of Marquette and State of Michigan, are held and firmly bound unto the Grand Union Tea Company, incorporated under the laws of the State of New Jersey, in the sum of Five Hundred Dollars, lawful money of the United States, to be paid to the said Grand Union Tea Company, its successors or assigns, which payment well and truly to be made and done, we do bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this seventh day of August, A. D. 1914.

Whereas, the said Grand Union Tea Company has entered into an agreement with the above bounden, Harvey Watters, by the terms of which he enters the employ of said Company, a copy of said agreement being hereto attached and made a part hereof.

Now, therefore, the condition of this obligation is such, that if the above bounden, Harvey Watters, shall well and truly return, or pay for all goods, merchandise, premium checks and premiums and other property received by him from said Company according to the terms and conditions of said agreement, and shall also observe all the other terms and conditions of said agreement, then this obligation to be void, otherwise to remain in full force and virtue.

HARVEY WATTERS. [SEAL.]
WILLIAM ANDREWS. [SEAL.]

C. F. KAY,
Witness to Harvey Watters.

33 STATE OF MICHIGAN,
County of Marquette, ss:

On this seventh day of August in the year one thousand nine hundred and fourteen, before me, the subscriber, a Notary Public in and for said County, personally appeared William Andrews and Harve[illegible] Watters, to me known to be the same persons described in and who executed the within instrument, who severally acknowledged the same to be their free act and deed.

[NOTARY SEAL.] RICHARD H. OLDS,
Notary Public, Marquette County, State of Michigan.

My commission expires April 2nd, 1918.

Ordinance No. 14.

An ordinance relative to the sale of goods, wares and merchandise.

The Village of Munising Ordains:

Section 1. It shall not be lawful for any person or persons to engage in peddling any goods, wares or merchandise on the public streets from house to house, or from vehicles or booths within the corporate limits of the Village of Munising or to canvass from house to house for the sale of property on subscription without having obtained a license therefor from the Clerk of said village.

Section 11. The Clerk of the Village of Munising shall issue a license for the purpose mentioned in the preceding section, to any person or persons applying for the same upon the payment of the following license fees:

For the sale of merchandise or provisions from house to house, Two Dollars for each day.

34 For canvassing for the sale of property on subscription, One Dollar for each day.

For the sale of goods and chattels from vehicles and booths, Two Dollars for each day.

Section 3. Any person violating any of the provisions of the ordinance upon conviction thereof, shall be punished by a fine of not exceeding Thirty Dollars and costs of prosecution and in default of the payment of such fine and costs of prosecution, such person shall be imprisoned in the common jail of Alger County for a period of not exceeding sixty days, or until such fine and costs of prosecution are paid, provided, that the whole term of such imprisonment does not exceed said period of sixty days.

Section 4. This ordinance shall take effect and be enforced from and after the 18th day of August, 1900.

Passed and approved by the Village Council of the Village of Munising, Michigan, this 30th day of July, A. D. 1900.

Approved July 30th, 1900.

W. M. LANGLEY,
Village Clerk.

THOMAS C. SULLIVAN,
Village President.

I hereby certify that the foregoing ordinance was duly passed by the Village of Munising on July 30th, A. D. 1900, and approved: that said Ordinance No. 14 was duly published in the Munising Republican, a regularly published newspaper of said village, for at least three consecutive weeks, between July 30th, A. D. 1900, and August 18th, A. D. 1900, the third publication being on August 18th, 1900. That said newspaper is regularly published, printed and circulated in said Village of Munising, Alger County, Michigan.

W. M. LANGLEY,
Village Clerk.

35 At a Session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifteenth day of June in the year of our Lord one thousand nine hundred and sixteen.

Present the Honorable
John W. Stone, Chief Justice; Franz C. Kuhn, Russell C. Ostrander, John E. Bird, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Rollin H. Person, Associate Justices.

27221.

THE PEOPLE
vs.
HARVEY WATTERS.

This cause coming on to be heard is argued by Mr. Potter for defendant and by Mr. Simmons for the People and submitted.

36 *Opinion.*

STATE OF MICHIGAN,
Supreme Court:

THE PEOPLE OF THE STATE OF MICHIGAN, Appellee,
vs.
HARVEY WATTERS, Defendant and Appellant.

Before the Full Bench.

MOORE, *J.:*

This case was tried before the circuit judge who filed a written opinion which we quote in part:

"The respondent was tried in Justice's Court for the offense of peddling in the city of Munising on, to-wit: July 8th, 1915, contrary to the provisions of Ordinance Number 14 of said city. He was convicted in justice court and appealed to the circuit court, where a trial was had at the October term before the Court, the respondent having waived a jury."

"The Grand Union Tea Company is a New Jersey Corporation

with headquarters at Brooklyn, N. Y., formed for the purpose of selling goods handled or manufactured by Jones Brothers of New York. It rents a building in Ishpeming, Michigan, in the front part of which it conducts a retail store. In the back part of the building and in the basement it conducts what is called a solicitors' department, in which it handles tea, coffee, soap, baking powders, spices, toilet preparations, etc., the first four articles constituting its principal business." * * *

The company has nine solicitors each having his own territory to cover.

"To trace the particular transactions complained of: it appears that on June 6th or 7th, the respondent took orders from various parties in Munising for certain articles including teas, coffees, toilet creams, etc. The orders were noted by respondent on an order book which he retained for his own use and which he did not turn in to the store, but which, under his contract, was the property of the company. Thereafter and about ten days or two weeks later, he turned in to the Ishpeming manager a commission bill of his orders, such commission bill being a statement in the aggregate of the goods he would need to fill the orders he had taken. The amounts of the separate customers' orders or the customers' names were not reported to the manager nor sent to the company. The orders taken in June were for July delivery.

* * * * * * *

37 "In the course of the conduct of the business at Ishpeming, the solicitors' department is filled with goods upon the arrival of freight from New York. Directly thereafter the solicitors' orders are filled so that the stock is greatly depleted. Sometimes the department runs out of certain articles, but at no time is it entirely empty. There are always some tea and coffee on hand and frequently other articles. Sometime prior to June the manager anticipating a fair sale of toilet creams, ordered an amount thereof and such creams were on hand in the solicitors' department in June, when respondent took his order, and two cans of toilet cream were included in respondents July delivery in Munising, the orders for them having been taken in June. So far as can be traced no articles included in respondent's June orders and July delivery at Munising were in the state when the orders were taken, except the two cans of toilet cream."

"It thus appears that the manager did not order from Brooklyn upon the direct basis of the solicitors' orders, but merely estimated the amount which he thought would be necessary to fill such solicitors' orders during the week the goods would arrive from New York. And because of error in his estimates, he sometimes had goods left over, which remained and were included in subsequent solicitors' orders. The surplus goods do not seem to have been transferred to the retail department. The estimated amount of goods left over each week after filling the orders was not shown."

* * * * * * *

"The principal contention of respondent is that he was engaged in interstate commerce and the ordinance is unconstitutional as far as it affects such acts. It appears however that the respondent took orders for some goods which were within the state when the order was taken, which had been shipped into the state without previous order therefor, and which were being held in the state for the purpose of sale to the public. As to such goods, the respondent and his employer were engaged in intrastate commerce."

"People vs. Bacon, 227 U. S. 504; 18 L. R. A. N. S. 134, note; 19 Cyc., 1231; Lange Medical Co. vs. Jacob, 163 Mich. 72."

"Where part of the transaction is purely an act of interstate commerce, still the state power over the separable internal part of the matter is unaffected. 7 Cyc. and note. The respondent was therefore guilty of peddling within the provisions of the ordinance."

"Counsel have urged a determination of the question of the general character of the business of respondent's principal, shown above, as to being intra or interstate commerce, for future guidance, but as the determination of this question is not necessary to the decision of this case and the full texts of the authorities cited are not available to the court at this time, a discussion rather in the nature of dicta, than of adjudication would be all that could be attempted."

The court took the case under consideration and on the 24th day of January, 1916, he found defendant guilty and sentenced him to pay a fine of ten dollars and costs, amounting to twelve dollars, within twenty-four hours, and in default of the payment of the said fine and costs, that he be confined to the county jail until such fine and costs are paid not exceeding thirty days.

The case is not here upon exceptions before sentence but is here upon writ of error. We quote from the brief of respondent:

38 "It is the contention of the defendant:

1. That if all of the goods for which orders were taken were outside of the State of Michigan when said orders were taken that the defendant was clearly engaged in interstate commerce.

2. That the fact that only two cans of toilet cream of the value of twenty five cents each, out of total deliveries of $66.75, were within the State of Michigan when the orders for said goods were taken, does not change the character of the business of the defendant, so as to bring him within the provisions of said Ordinance No. 14, for the reason that it is the principal character of the business and not the exception, which should determine the question of whether or not the defendant was engaged in interstate commerce on the day of his arrest."

If defendant may sell two cans of toilet cream may he sell fifty cans without violating the ordinance? It is not seriously contended that as to the sales of the toilet cream that it was interstate commerce. We think the authorities cited by the circuit judge clearly show as to those sales they were intrastate commerce and they made defendant guilty as charged, and it is wholly unnecessary to a disposition of the case to discuss the status of the other sales and especially so as sentence has been pronounced and presumably from the lapse of time been met.

We can do no less upon the record than to affirm the judgment and the other feature of the case becomes a moot question which we decline to consider.

Howe v. Doyle, 22 D. L. N. 889; Carlson v. Common Counsel, 22 D. L. N. 965; Schonwink v. Ferguson, 23 D. L. N. 265.

Judgment is affirmed.

JOSEPH B. MOORE.
RUSSELL C. OSTRANDER.
J. W. STONE.
FRANZ C. KUHN.
JOHN E. BIRD.
J. H. STEERE,
ROLLIN H. PERSON.
FLAVIUS L. BROOKE.

Endorsed: Filed Jul- 21, 1916. Jay Mertz, Clerk Supreme Court.

39 At a Session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-first day of July in the year of our Lord one thousand nine hundred and sixteen.

Present the Honorable:

John W. Stone, Chief Justice; Franz C. Kuhn, Russell C. Ostrander, John E. Bird, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Rollin H. Person, Associate Justices.

27221.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,
vs.
HARVEY WATTERS, Defendant.

The record and proceedings in this cause having been removed to this Court by Writ of Error, issued to the Circuit Court for the County of Alger, and the same and the matters in error assigned, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings and in the giving of judgment in said Circuit Court there is no error, therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Alger be and the same is hereby in all things affirmed.

40 Supreme Court, State of Michigan.

THE PEOPLE OF THE STATE OF MICHIGAN, Appellee,
against
HARVEY WATTERS, Defendant and Appellant.

Petition for Writ of Error.

To the Hon. John W. Stone, Chief Justice of the Supreme Court of the State of Michigan:

The petition of Harvey Watters, who resides at Ishpeming, Michigan, respectfully shows:

First. That heretofore, on the 9th day of July, 1915, a sworn complaint was made before Gilbert S. Meeker, Justice of the Peace of the City of Munising, County of Alger and State of Michigan, against the defendant, Harvey Watters.

The complaint alleged as follows:

"On the 8th day of July, A. D. 1915, at the City of Munising and in the county aforesaid, that Harvey Watters, a resident of the City of Ishpeming, in the State of Michigan, on said last mentioned day and on divers other days between last mentioned date and the first day of May, 1915, did go about the streets of the City of Munising, within the corporate limits of said City, and did engage in peddling goods, wares and merchandise from house to house in said City and did canvass and take orders from house to house in said City of Munising for the sale of goods, wares and merchandise, to wit: Tea, coffee, spices and other goods and wares, and did so go about said business and the taking of said orders from house to house in said City of Munising with a horse and wagon and on foot; he, the said Harvey Watters, not being a resident of the City of Munising, and not having paid and received any city license for carrying on said business in violation of Ordinance No. 14, being an ordinance relative to the sale of goods, wares and merchandise in the City of Munising, now incorporated into the City of Munising; he, the said Harvey Watters, not having paid the license fee required for carrying on said business to the City Clerk of said City, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan; whereof, the said E. W. Sullivan prays that said Harvey Watters may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require."

41 Second. That the defendant stood mute and the said Justice of the Peace entered a plea of not guilty. That said Justice found said defendant guilty of violating said ordinance and sentenced him to pay a fine of five dollars and costs of Eight and 33/100ths Dollars. Said defendant took an appeal from said judgment to the circuit court for the County of Alger, that being the county in which the City of Munising is located.

Third. Thereafter, and on the 22d day of October, 1915, the cause duly came on for trial before the Hon. Louis H. Fead, Judge of the Circuit Court for the County of Alger; the cause being an appeal from the Justice Court and was brought on for trial before the Circuit Judge without a jury; the jury being expressly waived by said defendant and the parties being in court by their attorneys.

Fourth. That thereafter, on November 23, 1915, the Circuit Court for the County of Alger rendered a written opinion. The Court in its opinion made a Statement of Facts, in part as follows:

"The Grand Union Tea Company is a New Jersey corporation, with headquarters at Brooklyn, N. Y., formed for the purpose of selling goods handled or manufactured by Jones Brothers of New York. It rents a building in Ishpeming, Michigan, in the front part of which it conducts a retail store. In the back part of the building and in the basement, it conducts what is called a solicitors' department, in which it handles tea, coffee, soap, baking powder, spices, toilet preparations, etc., the first four articles constituting its principal business. The retail department of the store is separated from the solicitors' department by a partition, doors leading from one to the other. Both departments are under the control of one manager and there are employed in the retail department two clerks, who also assist in the solicitors' department in putting up the solicitors' orders. The Company pays taxes in Ishpeming on its stock and wagons.

"In July last, the Company had nine solicitors, each having his own territory to cover. The respondent was one of such solicitors and his territory included the City of Munising. He worked on commission, under a written contract with the Company, 'as its salesman to solicit orders for and deliver goods, wares, merchandise, etc., in such place or places as first party shall designate.' Under such contract all goods, belonged to the Tea Company until they were delivered to the purchaser. Collections were made at the time of delivery and the respondent gave bond to pay for all such goods delivered, less the amount of his commission thereon. The respondent solicited orders from house to house in Munising, for delivery a month later. So far as shown, he delivered no goods at the time the orders for them were taken and he sold no goods from his wagon, except upon the prior order.

"To trace the particular transactions complained of; it ap-
42 pears that on June 6th or 7th, the respondent took order from various parties in Munising for certain articles, including teas, coffees, toilet creams, etc. The orders were noted by the respondent on an order book which he retained for his own use and which he did not turn into the store, but which, under his contract, was the property of the company. Thereafter, and about ten days or two weeks, later, he turned into the Ishpeming manager a commission bill for his orders. Such commission bill being a statement in the aggregate of the goods he would need to fill the orders he had taken. The amounts of the separate customers' orders or the customers' names were not reported to the manager nor sent to the company. The orders taken in June were for July delivery.

"Each Tuesday the manager estimated the goods necessary to fill the orders, which experience had shown him would be liable to come in, and sent an order to Brooklyn for the amount of such goods. The goods arrived in Ishpeming, about two weeks after the order was sent. They came in bulk, the tea in chests, the coffee in bags, etc., without specific designation in any way, consigned to the Grand Union Tea Company at Ishpeming. The manager and the clerks then put up the bulk goods into pound packages and filled the solicitors' orders therefrom. The respondent's June order at Munising was packed into one or two large boxes and shipped to Munising to the Grand Union Tea Company in care of respondent. There was nothing to indicate that any particular package belonged to any particular customer. The goods were shipped from Ishpeming on July 5th or 6th, and, upon July 8th, at Munising the respondent opened the boxes, loaded the goods upon a wagon, hired from the livery stable, and made his individual deliveries, collecting for the goods upon delivery. He also took orders at such time for delivery the next month. In case goods were rejected by customers, as frequently happened, they were returned to Ishpeming and put into the retail department of the store for sale.

"In the course of the conduct of the business at Ishpeming, the solicitors' department is filled with goods upon the arrival of freight from New York. Directly thereafter, the solicitors' orders were filled so that the stock is greatly depleted. Sometimes the department runs out of certain articles, but at no time is it entirely empty. There are always some tea and coffee on hand and frequently other articles. Sometime prior to June, the manager, anticipating a fair sale of toilet creams, ordered an amount thereof and such creams were on hand in the solicitors' department in June, when respondent took his order, and two cans of toilet cream were included in respondent's July delivery in Munising, the orders for them having been taken in June. So far as can be traced, no articles included in respondent's June orders and July delivery at Munising were in the State when the orders were taken, except the two cans of toilet cream."

It was admitted upon the record of the trial that the price received for the two cans of toilet cream by the defendant was fifty cents, or twenty five cents per can and also that the total deliveries by the defendant on July 8, 1915, and for which he received payment, was $66.75. The said Circuit Judge of Alger County in his said opinion stated in his Conclusions of Law as follows:

43 "The principal contention of respondent is that he was engaged in interstate commerce and the ordinance is unconstitutional as far as it effects such acts.

"It appears, however, that the respondent took orders for some goods which were within the state when the order was taken, which had been shipped into the State without previous order therefor, and which were being held in the state for the purpose of sale to the public. As to such goods, the respondent, and his employer, were engaged in intrastate commerce. * * *

"Where part of the transaction is purely an act of interstate com-

merce, still the state power over the separable internal part of the matter is unaffected. * * *

"The respondent was, therefore, guilty of peddling within the provisions of the ordinance. * * *

"After consideration of the cases cited so far as available and the excerpts quoted, it appears that the general character of the business of respondent's principal in the solicitors' department is interstate commerce."

Fifth. Thereafter, the said Circuit Court of Alger County took the case under further consideration and on the 24th day of January, 1916, found the said defendant guilty of the offense charged in the complaint and sentenced the said defendant to pay a fine of Ten Dollars and costs, amounting to Twelve Dollars, within twenty-four hours, and in default of the payment of said fine and costs that the said Harvey Watters be confined to the common jail of Alger County until said fine and costs were paid, not exceeding thirty days from and including the 24th day of January, 1916. That on the same day said defendant applied to said Circuit Judge for said County of Alger for a stay of proceedings on said judgment and sentence pending an appeal to the Supreme Court of the State of Michigan, whereupon said Circuit Judge made an express order to stay all proceedings on said judgment and sentence, upon the said defendant filing a bond in said case with the Clerk of said Court to the People of the State of Michigan, in the sum of Two Hundred Dollars. That thereafter and on said 24th day of January, 1916, the said defendant filed a good and sufficient bond with the Clerk of said Court of said County of Alger in the sum of Two Hundred Dollars which said bond was duly approved according to the order of said Circuit Judge and that said defendant has not, therefore, paid the fine and costs referred to in the judgment of the circuit court of the said
44 County of Alger and has not served his sentence as set forth in said judgment and sentence and has not for the same reason been taken into custody.

Sixth. That thereafter on March 2nd, 1916, the said Circuit Judge signed a bill of exceptions in order that the Supreme Court of Michigan on Writ of Error might, by going over the same, be able to make an examination of the entire case.

Seventh. That said bill of exceptions was duly filed in the office of the Clerk of the Supreme Court of the State of Michigan and a writ of error duly issued in said cause by the Clerk of the Supreme Court of the State of Michigan and that said cause came on for hearing before the Supreme Court of the State of Michigan.

Eighth. That the appeal to the Supreme Court of the State of Michigan was taken solely upon the ground that the defendant was engaged in interstate commerce at the time of his arrest and that the business conducted by him at said time was interstate commerce and that he was not guilty as charged in the complaint.

Ninth. That thereafter, on the 21st day of July, 1916, the Supreme Court for the State of Michigan affirmed the decision of the lower Court and said in part, after quoting extensively from the opinion of the lower court:

"We quote from the brief of the respondent:

'It is the contention of the defendant:

1. That as all of the goods for which orders were taken were outside of the State of Michigan when said orders were taken, that the defendant was clearly engaged in interstate commerce.

'2. That the fact that only two cans of toilet cream of the value of twenty-five cents each, out of total deliveries of $66.75, were within the State of Michigan when the orders for said goods were taken, does not change the character of the business of the defendant, so as to bring him within the provisions of said ordinance No. 14, for the reason that it is the principal character of the business and not the exception, which should determine the question of whether or not the defendant was engaged in interstate commerce on the day of his arrest.'

"If defendant may sell two cans of toilet cream may he sell fifty cans without violating the ordinance? It is not seriously contended that as to the sales of the toilet cream that it was interstate commerce. We think the authorities cited by the circuit judge clearly shows as to those sales they were intrastate commerce and they made defendant guilty as charged, and it is wholly unnecessary to a disposition of the case to discuss the status of the other sales and especially so as sentence has been pronounced and presumably from the lapse of time been met.

"We can do no less upon the record than to affirm the
45 judgment and the other feature of the case becomes moot question which we decline to consider."

Tenth. That thereafter on the — day of October, 1916, the defendant duly filed assignments of error in the office of the Clerk of the Supreme Court of said State of Michigan together with a prayer for reversal.

Eleventh. Your petitioner further shows that a decision concerning the validity of said ordinance No. 14, of the City of Munising, Michigan, was necessary in the determination of this cause and it was further necessary to determine whether under the facts appearing, defendant was protected by the interstate commerce clause of the United States Constitution.

Twelfth. That the validity of said ordinance was actually decided by this Court and it was further actually decided that the defendant was not protected by Sec. 8, Art. 1 of the Constitution of the United States relating to interstate commerce.

Thirteenth. That there was drawn in question in this cause the validity of said ordinance No. 14, which the appellee claimed was an authority exercised by a municipality under the laws of the State of Michigan.

Fourteenth. That said Circuit Court and said Supreme Court denied to the defendant the rights claimed by him under the Constitution of the United States and their judgments and decisions resulted in denying to the defendant his right to engage in interstate commerce in violation of Section 8 of Article 1, of the Constitution of the United States.

Wherefore, your petitioner prays for the allowance of a writ of

error from the Supreme Court of the United States to the Supreme Court of the State of Michigan, to the end that the record in said matter be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be corrected and said judgment reversed and that your petitioner may have such other and further relief in the premises as may be just and your petitioner will ever pray.

HARVEY WATTERS,
By W. T. POTTER, *His Att'y.*

W. T. POTTER,
Att'y for Petitioner,
Business Address, Ishpeming, Mich.

46 STATE OF MICHIGAN,
County of Marquette, ss:

W. T. Potter, being duly sworn, deposes and says that he is the Attorney of Record for the foregoing petitioner, and that the foregoing petition is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

W. T. POTTER.

Subscribed and sworn to before me this 7th day of October, A. D. 1916.

HENRY SANDERSON,
Notary Public, in and for said County and State.

My Com. expires January 20, 1917.

The Writ of Error as prayed for in the foregoing petition is hereby allowed this 9" day of October, 1916.

Bond for that purpose is fixed for the sum of $300.00. Such bond when approved to act as a supersedeas.

J. W. STONE,
Chief Justice of the Supreme Court
of the State of Michigan.

46½ [Endorsed:] Supreme Court, State of Michigan. The People of the State of Michigan, Appellee, vs. Harvey Watters, Defendant and Appellant. Filed Oct. 9, 1916. Jay Mertz, Clerk Supreme Court. "Petition for Writ of Error." W. T. Potter, Att'y for Petitioner.

47 UNITED STATES OF AMERICA, *ss:*

To the People of the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein Harvey Watters is plaintiff in error and you are defendant in error, to show

cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Stone, Chief Justice of the Supreme Court of the State of Michigan, this eleventh day of October, in the year of our Lord one thousand nine hundred and sixteen.

[Seal of the Supreme Court of Michigan.]

JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

Attest:
JAY MERTZ, *Clerk.*

LANSING, MICH., Oct. 17, 1916.

I, attorney of record for the defendant in error, in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

GRANT FELLOWS,
Attorney General of the State of Michigan.

48 Copy.

Know all Men by these Presents, that we, Harvey Watters of the City of Ishpeming, Michigan, as principal, and H. O. Young and Charles F. Kay, of the City of Ishpeming, Michigan, as sureties, are held and firmly bound unto The People of the State of Michigan in the full and just sum of Three Hundred dollars, to be paid to the said People of the State of Michigan its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eleventh day of October in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a Term of the Supreme Court of the State of Michigan in a suit depending in said Court, between The People of the State of Michigan, appellee, and Harvey Watters, defendant and appellant, a judgment was rendered against the said Harvey Watters and the said Harvey Watters having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said People of the State of Michigan, dated October ninth, 1916, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Harvey Watters shall prosecute his Writ of Error to effect, and an-

swer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HARVEY WATTERS. [SEAL.]
H. O. YOUNG. [SEAL.]
CHARLES F. KAY. [SEAL.]

Sealed and delivered in presence of—
C. F. KAY.
W. T. POTTER.
HERBERT J. POTTER.

Approved by—
JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

49 Supreme Court of the State of Michigan.

THE PEOPLE OF THE STATE OF MICHIGAN, Appellee,
against
HARVEY WATTERS, Defendant and Appellant.

Defendant's Assignments of Error.

And now comes Harvey Watters, the plaintiff in error, by W. T. Potter, his attorney, and makes and files these assignments of error:

First. The Supreme Court of the State of Michigan erred in holding in its opinion and judgment that the defendant at the time of his arrest was not engaged in interstate commerce.

Second. The Supreme Court of the State of Michigan erred in holding in its opinion and judgment that the business conducted by the defendant at the time of his arrest was not interstate commerce.

Third. The Supreme Court of the State of Michigan erred in holding in its opinion and judgment that the defendant did not seriously contend that he was engaged in interstate commerce as to the sales of toilet cream for the reason that such was the principal contention of the defendant by his attorney both orally upon the argument and in his printed brief.

Fourth. The Supreme Court of the State of Michigan erred in holding in its opinion and judgment that it was unnecessary to a disposition of the case to discuss the status of the sales other than the toilet cream.

Fifth. The Supreme Court of the State of Michigan erred in holding in its opinion and judgment that presumably from the lapse of time the judgment of the Circuit Court of Alger County had been met, for the reason that a stay of all proceeding pending an appeal had been duly granted and a bond in the penal sum of $200.00 had been duly filed.

50 Sixth. The Supreme Court of the State of Michigan erred in declining to consider in its opinion and judgment the fea-

tures of the case other than the sale of the two jars of toilet cream for the reason that the general course of the business and not a single isolated sale should control the legal rights of the parties.

Seventh. The Supreme Court of the State of Michigan erred in finding in its opinion and judgment, the defendant guilty of the charge set forth in the complaint.

Eighth. The Supreme Court of the State of Michigan erred in affirming in its opinion and judgment the judgment of the Circuit Court of the County of Alger of the State of Michigan.

Ninth. The Supreme Court of the State of Michigan erred in refusing to hold and adjudge that Ordinance No. 14 of the City of Munising, Michigan, was unconstitutional and void as applied to the defendant for the reason that the defendant was engaged in interstate commerce at the time of his arrest and said Ordinance so far as it applied to him and his business was in restraint of interstate commerce, in violation of Section 8, Article 1 of the Constitution of the United States.

And for the errors aforesaid the defendant prays that the verdict and judgment in said cause should be reversed, set aside and held for naught.

Dated October 7th, 1916.

W. T. POTTER,
Attorney for Plaintiff in Error.

Office and P. O. Address, Ishpeming, Mich.

[Endorsed:] Supreme Court of the State of Michigan. The People of the State of Michigan, Appellee, against Harvey Watters, Defendant and Appellant. Defendant's Assignments of Error. W. T. Potter, Att'y for Pl'ff in Error.

51 *Prayer for Reversal.*

Supreme Court of the State of Michigan.

THE PEOPLE OF THE STATE OF MICHIGAN, Appellee,
against
HARVEY WATTERS, Defendant and Appellant.

And now comes Harvey Watters, the plaintiff in error, by W. T. Potter, his attorney, and prays for a reversal of the judgment of the Supreme Court of the State of Michigan; which judgment was made and entered in the office of the Clerk of said Court on the 21st day of July, A. D. 1916.

Dated October 7th, 1916.

W. T. POTTER,
Attorney for Plaintiff in Error.

Office and P. O. Address: Ishpeming, Mich.

[Endorsed:] Supreme Court of the State of Michigan. The People of the State of Michigan, Appellee, against Harvey Watters, Defendant and Appellant. Prayer for Reversal. W. T. Potter, Att'y for Pl'ff in Error.

52 UNITED STATES OF AMERICA, *ss:*

[Seal of the U. S. District Court, Eastern District of Mich.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Michigan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of Michigan and Harvey Watters, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
53 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Harvey Watters as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the Eleventh day of October, in the year of our Lord one thousand nine hundred and sixteen.

ELMER W. VOORHEIS,
Clerk of the United States District Court for the Eastern District of Michigan, Sixth United States Circuit.

Allowed by

JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

54 To the Supreme Court of the United States:

The execution of the within Writ appears by the record hereto annexed.

October 18th, 1916.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk Supreme Court of the State of Michigan.

55 Supreme Court of the State of Michigan.

HARVEY WATTERS, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN, Defendant in Error.

IN THE SUPREME COURT, *ss:*

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Justices of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the Writ of Error, the Writ of Error with allowance endorsed thereon, the Citation with acceptance of service endorsed thereon by the attorney for the adverse party, a copy of the bond duly approved, together with the assignments of error, with the prayer for reversal, in the Supreme Court of the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing this 18th day of October, in the year of our Lord one thousand nine hundred and sixteen.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 25,582. Michigan Supreme Court. Term No. 752. Harvey Watters, plaintiff in error, vs. The People of the State of Michigan. Filed October 28th, 1916. File No. 25,582.

No. 58

Supreme Court of the United States

HARVEY WATTERS,

Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF MICHIGAN,

Defendant-in-Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF OF PLAINTIFF-IN-ERROR.

MAURICE B. DEAN,
Attorney for Plaintiff-in-Error,
Office & Post Office Address,
120 Broadway,
New York City.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 2277-78-79 Broad.

SUBJECT INDEX.

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Supreme Court of the United States

HARVEY WATTERS,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF MICHIGAN,
Defendant-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR.

Statement of Facts.

The plaintiff-in-error was tried on July 9, 1915, in Justice's Court of the City of Munising, Michigan, for the offense of *peddling and soliciting of orders,* contrary to the provisions of Ordinance No. 14 of said City (Record, p. 4). He was convicted (p. 4) and appealed to the Circuit Court of Alger County, where he was tried without a jury, the jury having been waived (p. 5). The Circuit Court, on November 23, 1915, found him guilty and, on January 24, 1916, sentenced him to pay a fine of ten dollars and costs amounting to twelve dollars, within twenty-four hours or, in default, be committed to the common jail of the County until such fine and costs were paid, not exceeding thirty days (p. 27).

The case was thereupon taken to the Supreme Court of Michigan upon assignments of error filed by the defendant (p. 27), and upon a bill of exceptions signed by the Circuit Judge certifying the substance of all the material evidence given at the trial (p. 28).

The Supreme Court affirmed the judgment of the Circuit Court of Alger County.

The facts over which there is no dispute are as follows:

On July 8th, 1915, the plaintiff in error, who resided at Ishpeming, Michigan, was employed under a written contract by the Grand Union Tea Company, a New Jersey Corporation, having its headquarters in Brooklyn, New York, as its salesman to solicit orders for and deliver its goods, wares and merchandise in such place or places as the company should designate (p. 30). He had worked for the company off and on for about eight years (p. 7). His territory consisted of the City of Ishpeming, Michigan, and the surrounding country, and the City of Munising, Michigan (p. 7).

On the said date, July 8th, 1915, *he solicited orders from house to house* in the City of Munising, which were to be delivered a month thereafter (p. 6). On the same day, *he also delivered merchandise* in said City for which he received payment amounting to $66.75 (pp. 6, 20). The goods so delivered had been previously ordered from him on June 6th or 7th (p. 12). The orders for the goods which he delivered on July 8th, he had turned over to the manager of the store maintained by the Grand Union Tea Company at Ishpeming, Michigan, about two weeks after June 6th or 7th (p. 15). The goods were boxed and shipped on

July 3d (p. 16) by the Ishpeming store addressed to the "Grand Union Tea Company, in care of Harvey Watters, Munising, Michigan" (p. 14). They were received by him on July 6th (p. 16). On July 8th, he rented a horse and wagon and delivered the goods in the City of Munising (p. 7). He had been doing business in Munising in a similar manner since the preceding November (p. 7).

He did not have a city license to peddle or solicit orders, for which alleged violation the complaint in this case was made against him.

The order which the plaintiff in error sent in to the manager of the Ishpeming store for the goods which he delivered on July 8th was in detailed form, for instance, showing the number of different kinds of tea and the total of each (p. 14), and if he asked for six pounds of coffee, it would be sent to him done up in six separate pound packages (p. 9). He received the goods in the proper sized packages convenient for filling his orders and they were boxed together when he received them (p. 14). He did not send the customers' names or their individual orders to the store (pp. 8, 9).

The store at Ishpeming was divided by a partition into two separate parts (pp. 12, 21). The front part was used as a retail store where goods were sold over the counter to such customers as came into the store. The rear of the store and the basement were used only for matching up the solicitors' orders, that is to say, putting up the orders that came in from the solicitors (p. 12). Both departments were in charge of the store manager and two clerks were employed in the retail department who assisted in putting up the solicitors' orders (p. 15).

Every Tuesday the manager of the Ishpeming store would send in an order for goods to headquarters at Brooklyn, New York, and ordinarily these goods would be received in Ishpeming two weeks later (p. 12). On the day of the receipt of the freight, there would be several drayloads of merchandise, but a week from that time there would be practically nothing left in the solicitors' department (p. 14). The tea would come in chests, half-chests and boxes; the coffee would come in what is known to the railroad company as "double bags," weighing one hundred pounds; the soap would come in boxes (p. 13). These bulk goods would then be divided up into convenient sized packages in order to fill the solicitors' orders (p. 14). Experience has shown the manager of the Ishpeming store about how many orders would come in each week and he anticipates the receipt of these orders by a few days only by procuring the goods from Brooklyn (p. 15).

The company employed altogether nine salesmen in the Upper Peninsula of Michigan, whose orders were filled from the Ishpeming store. At the time of the trial, there were eleven salesmen (p. 12). They all worked in the same manner as the plaintiff in error and their orders were all filled in the same manner. *They solicited orders and delivered goods along regular routes from the customers of the company at regular times.* They sent in constantly recurring orders which the manager of the Ishpeming store, by experience, could determine and depend upon in ordering from headquarters, so that each week's freight for the solicitors' department from Brooklyn was practically exhausted before the next week's freight arrived (pp. 12-18).

All the goods delivered by the plaintiff in error on July 8th, 1915, were outside of the State of Michigan, at the time the orders for them were taken on June 6th or 7th, with the exception of two cans of toilet cream (pp. 12, 16, 17) for which he received the price of 50¢ (p. 20). The toilet cream was a new item of merchandise for which an order was seldom taken and it happened in this particular case that these two cans of toilet cream which were included in this order, were within the State at the time the orders were taken from the customers (p. 17). *The general business of the company is selling teas, coffees, soaps, baking powders and spices* (pp. 7, 17), *all of which generally and particularly in the case of the goods delivered by the plaintiff in error on July 8th, were without the State of Michigan at the time the orders were taken* (pp. 12, 17), *with only the exception stated.*

All goods returned by the solicitors on unfilled orders are not placed in the solicitors' department, but are put into the retail department (p. 13). The store is assessed in Ishpeming and there is a tax on the stock, fixtures and horses and wagons (p. 16). *The solicitors are not permitted to sell goods from their wagons, but only to take orders for delivery a month later.* The plaintiff in error did not sell anything from his wagon on the day in question and delivered only the goods that had been ordered from him thirty days before (pp. 9, 13).

The written contract between the company and the plaintiff in error expressly provided that title to all books, cards, papers, lists of customers, documents and papers of every kind connected with the

business and all knowledge and information acquired by the plaintiff in error in connection with the business should belong to the company, and he agreed to turn over to the company such property and information upon the termination of his employment. *It is also provided that title to all merchandise remained in the company until delivered to the customer* (p. 30).

The contract expressly stated that it was deemed to be made when accepted by the Grand Union Tea Company, at its office, 68 Jay Street, Brooklyn, New York (p. 32).

He also gave a bond in the sum of $500 to protect the company for the value of the merchandise and other property received by him and also that he would faithfully observe all the terms and conditions of the contract (p. 33).

The plaintiff in error was paid a commission upon his sales as his compensation (p. 7).

A statement of facts compiled by the Circuit Judge of Alger County, appears in the Record, page 20.

The Supreme Court of Michigan held that because there were two cans of toilet cream in the order delivered by the plaintiff in error on July 8th, in the City of Munising, which were within the State at the time the order was taken, that he violated the ordinance against peddling. **The Court refused to consider the general character of the business or the sale and delivery of the goods other than the two jars of toilet cream,** or the fact that he was engaged in soliciting orders for the future delivery of merchandise which at the time was without the State of Michigan and which was moved into the State as the result of such order.

Assignments of Error Relied Upon.

The plaintiff in error filed the following assignments of error and relies upon them in this Court:

"FIRST.—The Supreme Court of the State of Michigan erred in holding in its opinion and judgment that the *defendant* at the time of his arrest was not engaged in interstate commerce.

"SECOND.—The Supreme Court of the State of Michigan erred in holding in its opinion and judgment that the *business* conducted by the defendant at the time of his arrest was not interstate commerce.

"THIRD.—The Supreme Court of the State of Michigan erred in holding in its opinion and judgment that the defendant *did not seriously contend that he was engaged in interstate commerce as to the sales of toilet cream,* for the reason that such was the principal contention of the defendant by his attorney both orally upon the argument and in his printed brief.

"FOURTH.—The Supreme Court of the State of Michigan erred in holding in its opinion and judgment that it was *unnecessary to a disposition of the case to discuss the status of the sales other than the toilet cream.*

"FIFTH.—The Supreme Court of the State of Michigan erred in holding in its opinion and judgment *that presumably from the lapse of time the judgment of the Circuit Court of Alger County had been met,* for the reason that a stay of all proceeding pending an ap-

peal had been duly granted and a bond in the penal sum of $200 had been duly filed.

"SIXTH.—The Supreme Court of the State of Michigan erred in *declining* to consider in its opinion and judgment the features of the case *other than the sale of the two jars of toilet cream*, for the reason that the general course of the business and not a single isolated sale should determine the legal rights of the parties.

"SEVENTH.—The Supreme Court of the State of Michigan erred in finding in its opinion and judgment the defendant guilty of the charge set forth in the complaint.

"EIGHTH.—The Supreme Court of the State of Michigan erred in affirming in its opinion and judgment the judgment of the Circuit Court of the County of Alger of the State of Michigan.

"NINTH.—The Supreme Court of the State of Michigan erred in refusing to hold and adjudge that Ordinance No. 14 of the City of Munising, Michigan, was unconstitutional and void as applied to the defendant for the reason that the defendant was engaged in interstate commerce at the time of his arrest and said Ordinance so far as it applied to him and his business was in restraint of interstate commerce, in violation of Section 8, Article 1 of the Constitution of the United States."

The FIRST, SECOND and NINTH assignments of error are relied upon for the purpose of showing that the plaintiff in error was engaged in interstate commerce at the time of his arrest and

that, therefore, Ordinance No. 14 of the City of Munising, was void and unconstitutional and inapplicable to him as it constituted a burden upon interstate commerce in violation of Section 8, Article 1, of the Constitution of the United States.

The THIRD and FOURTH assignments of error are relied upon for the purpose of showing that the Supreme Court of Michigan refused to consider the principal character of the business engaged in by the plaintiff in error, but based its decision upon an isolated transaction, to wit: that two cans of toilet cream were within the State of Michigan at the time the order for them was solicited and received. *The plaintiff in error contends in this Court as he contended in the lower courts that a broad general view of the entire* business should be taken; that the Supreme Court of Michigan erred when it refused to consider the whole of the business engaged in by him and that decision, therefore, was not properly grounded; that it was impossible and constituted error for the Supreme Court of Michigan to arrive at a proper legal constitution of the facts without passing upon and considering the whole of the business conducted and transacted by the plaintiff in error on July 8th, 1915, *and without considering how the orders which he took on that day were to be filled and how the orders for goods which he delivered on that day had been previously taken and filled.*

The THIRD Assignment of Error is also relied upon to show how the Supreme Court of Michigan misunderstood and failed to grasp the principal contention of the plaintiff in error, to wit: That the whole general course of business should be considered and that he contended that the whole

course of business showed that it was interstate commerce, although it was admitted that the two cans of toilet cream were within the State at the time the order was taken, but that it was an isolated sale and constituted only 1/133 of the value of the goods delivered, and a much smaller part when the value of the orders taken on that day for future delivery is taken into consideration.

The FIFTH Assignment of Error is relied upon for the purpose of showing that the **Supreme Court of Michigan believed that the fine and costs had been paid by the plaintiff-in-error and was, therefore, probably the reason why the Court did not enter into a more careful and exhaustive consideration of the legal principles involved in the business of the plaintiff-in-error.**

It seems incredible that the Supreme Court of Michigan did not know or assume, if it did not know, that a stay had been granted pending the appeal and that the usual bond had been given.

The SEVENTH and EIGHTH Assignments of Error are relied upon to show that the Supreme Court of Michigan erred in affirming the judgment of the Circuit Court of Alger County in finding the defendant guilty. This is directed generally to the principal contention of the plaintiff in error, to wit: That on July 8th, 1915, he was engaged in interstate commerce because he was delivering goods previously ordered and was soliciting orders for the future delivery of goods which were without the State and which were to be brought within the State as a result of his orders; that those goods according to the usual course of

business were kept separate and apart and were not mingled with the goods to be sold at retail and were not exposed or offered for sale within the State; that the goods were continually in transit from the time they left Brooklyn, New York, until they were in the hands of the customers in the City of Munising, Michigan; that the company retained title to the goods until that time; that the plaintiff in error was employed under a written contract signed and accepted outside the State of Michigan, he being a resident of that State; that he was engaged in interstate commerce and that the business he conducted was interstate commerce and that, therefore, Ordinance No. 14 of the City of Munising, violated the interstate commerce clause of the Federal Constitution and imposed an unlawful restraint upon the plaintiff in error and upon his business and was for that reason, as to him, unconstitutional and void.

POINT I.

The taking of orders in one State for goods to be shipped from another State constitutes interstate commerce exclusively under Federal control and not subject to the burden of a municipal ordinance.

The point and general rule may otherwise be stated as follows:

THE NEGOTIATION OF SALES OF GOODS WHICH ARE IN ANOTHER STATE FOR THE PURPOSE OF INTRODUCTING THEM INTO THE STATE IN WHICH THE NEGOTIATION IS MADE, IS INTERESTATE COMMERCE.

IN THE LOWER COURT, THE CIRCUIT JUDGE, LOUIS H. FEAD, STATED IN HIS OPINION AS FOLLOWS (p. 25):

> "After consideration of the cases cited so far as available and the excerpts quoted, **it appears that the general character of the business of respondent's principal in the solicitors' department is interstate commerce.**
>
> "It seems to be laid down definitely in the cases:
>
> "1. That the negotiation of the sale of goods which are in another State, for the purpose of introducting them into the State where negotiation is made, is interstate commorce.
>
> "2. The interstate commerce character of a transaction is not affected by the fact that the goods are shipped to an agent in bulk and the packages broken for the purpose of distribution.
>
> Robbins vs. Shelby Co., Tax Dist., 120 U. S., 489;
> Re Spain, 14 L. R. A., 97;
> Dozier vs. State, 218 U. S., 389;
> Crenshaw vs. Arkansas, 227 U. S., 389."

THIS OPINION WAS AFFIRMED (192 Mich., 462) BY THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF MICHIGAN AND MUST, THEREFORE, BE BINDING UPON THE PEOPLE OF THE STATE OF MICHIGAN, IN THE CASE AT BAR.

We should bear constantly in mind that the City of Munising does not claim that its ordin-

ance is a tax upon property, *but only that it is a privilege or occupation tax or license to peddle or solicit orders.*

The delivery of goods on July 8th, 1915, by the plaintiff in error was pursuant to the orders which he had previously solicited and received on June 6th or 7th (p. 12). The solicitation of the order and the delivery of the goods together made up one sale. As said by Mr. Justice Brown in Norfolk & Western Railway Co. vs. Simmons, 191 U. S., 441, at p. 447:

> "A sale really consists of two separate and distinct elements, first, a contract of sale, which is completed when the offer is made and accepted; and, second, a delivery of the property, which may precede, be accompanied by or follow the payment of the price, as may have been agreed upon between the parties, the substance of the sale is the agreement to sell and its acceptance.
>
> "That possession shall be retained until payment of the price may or may not have been a part of the original bargain, but in substance it is a mere method of collection, and we have never understood that a license could be imposed upon this transaction, except in connection with the prior agreement to sell, although in certain cases arising under the police power it has been held that the sale is not complete until delivery, and sometimes not until payment."

The interstate commerce character of the business of the Grand Union Tea Company has just

recently been passed upon by a Federal Court in the case of Grand Union Tea Company vs. Evans, reported in 216 Fed. Rep., 791. In that case the entire general business of the Company was passed upon and there were certain elements tending more strongly to take the business out of the interstate commerce transaction than in the case at bar.

The opinion of the Court is quoted herein in full because the case was given very careful consideration by the Federal Court, and because it involved the constitutionality of a state statute and because the opinion was rendered by a circuit judge and two district judges:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

GRAND UNION TEA COMPANY, a corporation, etc.,
Plaintiff,
against
WALTER H. EVANS, et al.,
Defendant.

Before—GILBERT, Circuit Judge, and WOLVERTON and BEAN, District Judges.

"This is an application for a preliminary injunction, restraining various officers of the State from enforcing, or attempting to enforce, as against the plaintiff and its representatives, the Oregon Peddlers' Law, upon

the ground, among others, that as applied to the plaintiff, the law constitutes an unconstitutional intereference with interstate commerce. An order to show cause was issued, which was answered by a motion to dismiss.

"From the complaint it appears that the plaintiff is a New Jersey corporation, engaged in selling goods prepared and manufactured for it by Johns Brothers Company, a New York corporation. The goods, when manufactured, are packed and marked with the label and name of the plaintiff and delivered to it at the factory, from which place they are forwarded by the plaintiff, for sale and distribution to various parts of the Union.

"The plaintiff maintains a store in Portland, where a small part of its merchandise is sold at retail over the counter, but the principal part of its business in Oregon is done through solicitors, who go regularly from place to place on fixed routes soliciting and taking orders for future delivery. The orders when taken are sent to the Portland store by mail, or taken there personally by the solicitors, where they are filled and the goods shipped to or delivered to the solicitors, who deliver the same to the customers and collect the purchase price on their next trip over their respective routes.

"The agents or solicitors are allowed a certain percentage of the original price as a commission, but are not permitted to sell goods at retail from their wagons or in any other manner than by taking orders for future delivery, and all goods not accepted by customers are returned to the store and placed in stock for sale over the counter.

"The agents or solicitors are, for convenience, divided into five classes: First, those who have given a bond to the company to save it harmless from loss for the value of goods placed in their custody for delivery. Second, those who act on a C. O. D. basis, that is, at the time the goods to fill the orders taken by them are shipped, a bill-of-lading with draft attached is sent to some local bank, where the agent desires receipt of the goods, or sent along with the goods to the local freight office and the agent is required to pay such draft before receiving possession of the goods. Third, those who send in with the orders taken by them cash or checks to cover the value thereof less commission. Fourth, those who have established a credit with the company and are not required to pay for goods shipped to fill orders taken by them until they procure a second order, and fifth, those who have deposited cash with the plaintiff as security for goods shipped to them.

"All of the goods shipped to agents to fill orders previously taken are shipped to and addressed to the company in care of the agent and remain the exclusive property of the company until actually delivered to the customers, and all cards, memoranda of information concerning the customers along the various routes belong to the plaintiff, and the agents or solicitors are required to deliver the same to the plaintiff upon the termination of their relations with it.

"The Portland store does not keep a stock of goods on hand with which to fill orders taken by the solicitors, but experience has shown the

manager thereof about how many orders will come in each day and each week in the usual course of trade, and in order to fill the continually recurring orders he will anticipate by a few days only the procurement of goods sufficient to fill such orders by ordering them from the places outside of the state. Goods not of a perishable nature, such as soap and baking powder are sent from the home office, by water, to Portland. *These goods are, to some extent, kept in stock, but the orders of the Portland store are not greater than may be received in carload lots, and as are necessary to fill the constantly recurring orders.* Practically all the other goods, such as teas, coffees, chocolates, cocoa, etc., are ordered from Seattle in the State of Washington in no greater amount than necessary to fill the recurring orders received in the usual course of trade, and so as to match orders which are being taken when the goods to fill them are in transit, the course of business being as follows:

"The manager of the Portland store makes up his orders for shipment on Friday or Saturday to send to Seattle on the following Monday. The goods arrive at Portland on Friday or Saturday of the same week they are ordered, and are used to fill the orders which the solicitors send in to the store the following week, or which were taken by them the same week the goods were ordered from Seattle, or the preceding week. The goods do not arrive at the store until after the orders from the customers have actually been taken and probably one-half thereof actually received by the store

manager. When received, the goods are in the usual packing cases, cartons or parcels and are unpacked in the basement of the store or wareroom in the rear of the store, and are kept separate and apart from goods for local sale, except teas and coffees, which are kept in the main store for cleanliness and convenience. Orders from the several agents when received are filled from the packing boxes in the basement of the store by employees, who do nothing else but fill orders, except that the orders for tea and coffee are taken from the main store.

"At all times the goods are constantly in transit from the time they are shipped by the plaintiff at its home office until they are in the hands of the customers along the various routes, and remain no longer in the Portland store than necessary to match up orders which are coming in from continually recurring sources along well defined and certain routes. **In every case, with the possible exception of soap and baking powder, which is only a small part of the gross business of the plaintiff, the goods when the orders are taken are without the state.**

"The motion to dismiss is based on three grounds:

'1. That a court of equity is without jurisdiction.

'2. That the relation between the plaintiff and its various solicitors is that of a vendor and vendee and not principal and agent, and therefore the plaintiff is not the proper party to this suit.

'3. That the plaintiff is not engaged in interstate commerce and therefore its agents or solicitors are subject to the provisions of the Peddlers Act.'

"The first question is disposed of by the recent case of *Little* vs. *Tanner* (208 Fed., 605), in which it was held that a court of equity has jurisdiction of a suit enjoining state officers from threatening enforcement of a void statute which affects property rights, although its violation is punishable as a criminal offense. (See also *Adams Express Co.* vs. *N. Y.*, 232 U. S., 14).

"The second question is concluded by the averment of the complaint, which for the purposes of this motion must be assumed to be true. It is clearly alleged that the solicitors are agents and representatives of the plaintiff, receiving orders for it and not for themselves; that the goods handled by them remain and are the property of the plaintiff until delivered to the customer. The method adopted to secure plaintiff from loss on account of goods handled by its agents, is merely a matter of convenience and does not change the actual relation of the parties from that of principal and agent to that of vendor and vendee.

"The general principles by which it has been determined that the taking of orders in one state for goods to be shipped from another constitutes interstate commerce exclusively under Federal control and not subject to the burden of state legislation, have so often been announced by the Supreme Court as 'to cause them to be elementary' (*Browning* vs. *Waycross*, 233 U. S., 16, *decided April* 6, 1914). The

sole question therefore in any given case is, whether the manner in which the business is carried on comes within the rules laid down. It would be a waste of time to review the cases and point out the similarity or dissimilarity to the one in hand.

"It is enough, that in our opinion, the facts stated in the complaint bring this case within *Crenshaw* vs. *Arkansas* (227 U. S., 389), and *Stewart* vs. *Michigan*, 232 U. S., 665. THE ONLY DIFFERENCE, IF ANY, BETWEEN IT AND THE CRENSHAW CASE, IS THAT IT MAY BE ASSUMED, ALTHOUGH NOT STATED, THAT IN THE CRENSHAW CASE THE GOODS WERE NOT ORDERED BY THE LOCAL REPRESENTATIVES OF THE VENDOR UNTIL THE CUSTOMER'S ORDERS HAD BEEN RECEIVED BY HIM, WHILE IN THIS CASE THE SHIPMENTS WERE ORDERED PRIOR TO THE ACTUAL RECEIPT OF THE CUSTOMER'S ORDERS BY THE AGENT BUT WHILE SUCH ORDERS WERE BEING TAKEN IN THE FIELD AND DURING THE TIME THE GOODS WERE IN TRANSIT. THIS, WE TAKE IT, DOES NOT AFFECT THE CHARACTER OF THE BUSINESS, IT WAS A MERE MATTER OF DETAIL IN THE MANNER OF CONDUCTING IT. We conclude, therefore, that the plaintiff was engaged in interstate commerce and therefore the Peddlers Act does not apply to its business."

Filed August 17, 1914 (Injunction will issue).

This case has been cited with approval by the Federal Court in *Landon* vs. *Public Service Com.*, 242 Fed., 658.

THE BUSINESS OF THE GRAND UNION TEA COMPANY WAS AGAIN HELD TO BE INTERSTATE COMMERCE in the case of MT. HOLLY SPRINGS BOROUGH vs. WILT, decided in the Court of Common Pleas of Cumberland County, Pennsylvania, July 1st, 1915, and reported in 43 Pa., Co. Ct. Rep., 566. That decision is of great importance because it showed the tendency of State courts of inferior jurisdiction to follow the Federal rule set down in the Oregon decision and to re-emphasize the interstate commerce character of the business of the Grand Union Tea Company. The facts in the Mt. Holly Springs Borough case were practically the same as in the Oregon case.

The following is quoted from the opinion of W. F. SADLER, President Judge.

> "The Council of the Borough of Mt. Holly Springs enacted an ordinance entitled 'An Ordinance providing for the protection of the homes of the citizens of the Borough of Mount Holly Springs, Pennsylvania, from the intrusive visits of fraudulent peddlers, in regulating the soliciting of orders and the sale and delivery of merchandise.'
>
> "And provided, 'That on and after the passage of this Ordinance every person engaged in peddling or canvassing from house to house in the Borough of Mount Holly Springs, Penna., for the purpose of selling or soliciting orders for, by sample, and otherwise,

books, paintings, wares or merchandise of any kind, or persons delivering such orders so obtained, shall be required to procure a license from the Burgess.'

"The Grand Union Tea Company is a New Jersey corporation, located in that State, and engaged in the selling of teas, coffee, baking powder, spices, etc., throughout the several States. Its products are manufactured in Brooklyn, New York, where they are packed and marked with the label and name of the Grand Union Tea Company, and from which point they are forwarded for distribution to its stores in the various States of the Union.

"One of these stores in located in Harrisburg, Pennsylvania. A small part of the merchandise received there is sold over the counter at retail, but the principal part of the business there transacted is done through salesmen or agents who go regularly from place to place on fixed routes, soliciting and taking orders for future delivery. These orders are sent to the Harrisburg depository by mail, or personally taken there by the salesmen, where they are filled, and the goods sent or delivered to the solicitors, who deliver the same to the customers and collect the purchase price, and who at the same time take orders for future delivery. Harry Wilt, the defendant in this case, is such a salesman or agent, and is allowed a certain percentage of the retail price as a commission, but does not sell at retail, or in any other manner than by taking orders for future delivery, and should any not be accepted by customers, they are returned

to the depository in Harrisburg and placed in stock for sale over the counter.

"He, Wilt, gave a bond to save the Grand Union Tea Company harmless for the value of goods, which came into his custody as agent or solicitor.

"The goods sent to Harry Wilt by the Tea Company were addressed to it in his care, and remained the property of that Company until actually delivered to the customer; and all cards, memoranda or information concerning the customers along the various routes belong to it, and which the said Wilt is required to deliver to it, the said Tea Company, upon the termination of his relations with it.

"The Harrisburg store or depository does not keep a stock of goods on hand with which to fill the orders taken by said Harry Wilt, but as experience has shown the Manager thereof of about how many orders will come in during each day and week in the usual course of business, in order to fill these continually recurring orders, he anticipates by a few days only, the procurement of goods by ordering them from the Factory, so located outside the State. Goods are received from it in less than carload lots, in each week to fill the orders which the solicitors have sent to the store the preceding or following week. THE GOODS DO NOT ENTER THE STATE HOWEVER UNTIL AFTER ORDERS HAVE BEEN TAKEN FROM CUSTOMERS, AND IN SOME CASES A PORTION THEREOF ACTUALLY RECEIVED BY THE MANAGER OF THE HARRISBURG STORE. WHILE OCCASIONALLY SOME

PARTICULAR GOODS ARE AT THE STORE WHEN THE ORDERS ARE TAKEN, THIS IS THE EXCEPTION RATHER THAN THE RULE, AND CONSTITUTES BUT A VERY SMALL PORTION OF THE GROSS BUSINESS.

"It is further agreed in the case stated that the goods are constantly in transit from the time they are shipped by the Grand Union Tea Company at its home office until they are in the hands of customers along the various routes, and remain no longer in the Harrisburg store than is necessary to match up orders which are coming in from continuous recurring sources along well defined and certain routes.

"The Company has built up a route, which includes the Borough of Mount Holly Springs, and Harry Wilt, the defendant in this case, is the salesman acting for it in soliciting orders in that place every two weeks, which are forwarded to the store in Harrisburg where the same are filled in the manner above set forth. The goods ordered by him are forwarded from the Harrisburg store and delivered directly to the customers in the Borough of Mount Holly Springs. The proceeds of the sales collected by the salesman are remitted to the Harrisburg Store, less the commission payable to him, under the terms of his contract.

"Harry Wilt failed to take out a license giving him the right to solicit orders as provided by the aforesaid ordinance of that borough, and proceedings were instituted before the Burgess to recover the penalty which

was provided in the same, on the 15th day of April, 1915, for failure to take out a license before so soliciting, who adjudged that the defendant should pay a fine of ten dollars.

"The defendant contends that his conviction, and the imposition of a fine upon him was not justified for the reason that the ordinance under which the proceedings were had was unconstitutional, in so far as it applied to interstate traffic, in that it violates the commerce clause of the Constitution of the United States, Clause 3, Sec. 8, Art. 1. Clause 3 provides that 'Congress shall have the power to regulate commerce with foreign nations and among the several States and with the Indian tribes.' "

The Court reviewed at length all of the leading cases on the subject of soliciting orders for the future delivery of goods which are without the State at the time the orders are taken, and in conclusion said:

"A careful examination and consideration of the adjudicated cases, which were cited by counsel on one side and the other, as well as others, to which we have had access, has led us to the conclusion that THE GRAND UNION TEA COMPANY IS ENGAGED IN INTERSTATE COMMERCE, and the defendant Harry Wilt was acting as one of its agents or solicitors, and that, therefore, the ordinance of the Borough of Mount Holly Springs is unconstitutional, and therefore invalid, in so far as it renders it obligatory upon him to

take out a license, or be subjected to the penalty therein provided for failure to do so."

The attention of the Court is respectfully and earnestly directed to the fact in the above case that

> *" hile occasionally some particular goods are at the store when the orders are taken, this is the exception rather than the rule and constitutes but a very small portion of the gross business."*

Both in the Oregon case and in the Wilt case a small portion of the goods were within the State when the orders for them were taken, but these exceptions did not make the businss intrastate.

The first and leading case holding that the soliciting of orders for future delivery of goods which are without the State is interstate commerce is Robbins vs. Shelby County Taxing District (1887), 120 U. S., 489, 497:

> *"It seems to be forgotten, in argument, that the people in this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former, independent of the latter and free from any interference or restraint from them.*
>
> "As soon as the goods are in the state and become part of its general mass of property, they will become liable to be taxed in the

same manner as other property of similar character, as was distinctly held by this Court in the case of *Brown* vs. *Houston,* 114 U. S., 622. When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state but are only taxed in the usual way as other goods are. *Brown* vs. *Houston,* quo supra; *Machine Co.* vs. *Gage,* 100 U. S., 676. *But to tax the sale of such goods, or the offer to sell them before they are brought into the state is a very different thing, and seems to us clearly a tax on interstate commerce itself.*

"If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interests of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system, applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on the subject, would be but a repetition of the disorder which prevailed under the articles of confederation."

Another later case is Crenshaw vs. Arkansas, 227 U. S., 389 (1910). In this case an Act of the

State of Arkansas provided that any person who travels over or through any county and peddles or sells any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle, or either of said articles, should procure a license. The Range Stove Company of St. Louis employed salesmen in the State of Arkansas to solicit orders, which were forwarded to one Sutton, an employee of the company within the State, who investigated the purchases, and if found satisfactory, sent the orders to St. Louis. All ranges ordered were shipped in car load lots, consigned by the company to itself in care of said Sutton at various points within the State, convenient for delivery. A car load of the ranges was thus shipped from St. Louis to Eldorado, Arkansas, for the purpose of filling orders previously secured by the said agent or travelling salesman. As said by the Federal Court in Grand Union Tea Company vs. Evans (supra), it did not appear whether or not the orders were sent out of the State or whether the agents' orders were anticipated by the procurement of the ranges to meet them. Upon the arrival of the car at Eldorado, the ranges were taken therefrom, loaded on a delivery wagon and delivered to the purchaser. It does not appear, but rather is assumed, that no one particular stove was sent to fill any one particular order, but that the stoves were simply stoves and the orders were filled from the cars, irrespective of any particular selection.

The Court said (page 389):

> "This law is attacked and the conviction of Crenshaw and Ganaway alleged to be unlawful because, among other reasons, the law im-

poses a direct burden upon interstate commerce, exclusively within Federal control, and therefore beyond the power of the State to regulate. Under the facts which we have stated, and upon which the Court below decided the case, we think the law applicable to the present situation is well settled by previous decisions of this Court.

"The leading case is *Robbins* vs. *Shelby County Taxing District,* 120 U. S., 489.

Robbins was a resident of Cincinnati, Ohio, and was convicted of having *offered for sale* articles of merchandise belonging to a firm in Cincinnati, to be shipped into Tennessee, without having secured the license required by statute. In that case, while this Court recognized the power of the State to pass inspection laws to secure the due quality and measure of products and commodities and laws to regulate or restrict the sale of articles deemed injurious to the health or morals, the principle was laid down (page 497), that *'the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce,'* and it was held beyond the power of the State to impose a license tax upon the privilege of conducting such business. That case has been strictly adhered to in this Court since its decision, and it is only necessary to notice a few of the many cases in which it has been applied."

Referring to this case, the United States Supreme Court in Rogers vs. States of Arkansas, 227 U. S., 401 (p. 409), said:

> "In fact, the only difference (between the Crenshaw case and this case), is that the ranges were shipped to the company, bearing no marks to identify the purchasers and were delivered to the purchasers by the delivery men without distinction, while the vehicles were tagged at Memphis and upon arrival in Arkansas were delivered by the deliverymen to the purchasers whose names appeared upon the tags attached to the vehicles. This is merely a matter of detail in the manner in which the business is conducted and does not affect its character."

The Crenshaw case (supra) cites with approval: *Robbins* vs. *Shelby County Taxing District,* 120 U. S., 489; *Brennen* vs. *Titusville,* 153 U. S., 289; *Caldwell* vs. *North Carolina,* 187 U. S., 622; *Rearick* vs. *Pennsylvania,* 203 U. S., 507; *Dozier* vs. *Alabama,* 218 U. S., 124; *Walling* vs. *Michigan,* 116 U. S., 446.

The Crenshaw case (supra) also distinguishes the case of Emert vs. Missouri, 156 U. S., 296, in the following language:

> "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one state to another; and were neither interstate commerce in themselves, nor were they

in any way directly connected with such commerce.

"In the Emert case, therefore, there was no movement of goods in interstate commerce, because of orders taken for their sale; but the specific articles carried about by the peddler, and none other, were sold and delivered by him."

The rule was gain affirmed in Stewart vs. Michigan, 232 U. S., 665, and is now established beyond question.

It has been unheld in the following cases:

U. S. — Robbins vs. Shelby County Taxing District, 120 U. S., 489; 7 S. Ct., 592; 30 L. Ed., 694 (reversing 13 Lea [Tenn.], 303).

— Leloup vs. Mobile, 127 U. S., 640; 8 S. Ct., 1380; 32 L. Ed., 311.

— Asher vs. Texas, 128 U. S., 129; 9 S. Ct., 1; 32 L. Ed., 386 (reversing 23 Tex. App., 662; 5 S. W., 91; 59 Am. Rep., 783).

— Stoutenburgh vs. Hennick, 129 U. S., 141; 9 S. Ct., 256; 32 L. Ed., 637 (applying to the District of Columbia).

— Brennan vs. Titusville, 153 U. S., 289; 14 S. Ct., 829; 38 L. Ed., 719 (reversing 143 Pa. St., 642; 22 Atl., 893; 24 Am. St. Rep., 580; 14 L. R. A., 100).

— Caldwell vs. North Carolina, 187 U. S., 622.

— Rearick vs. Pennsylvania, 203 U. S., 507.

— Dozier vs. Alabama, 218 U. S., 124.

— Crenshaw vs. Arkansas, 227 U. S., 389.

— Rogers vs. Arkansas, 227 U. S., 401.
— Stewart vs. Michigan, 232 U. S., 665.

These cases have been followed in so many Federal and State decisions that it would serve no useful purpose to cite them all.

It is not necessary that the goods remain in their original package until they reach the purchaser, but the shipment when received by the agent may be split up by him as a mere detail of business, in order to facilitate delivery.

In Caldwell vs. North Carolina, 187 U. S., 622, 632, the Court said:

> "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself or by a personal agent had carried and delivered the goods to the purchaser; that the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate * * *
>
> "It cannot escape observation that efforts to control commerce of this kind in the interest

of the states, where the purchasers reside have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation."

To same effect see:

Rearick vs. Pennsylvania, 203 U. S., 507.
Dozier vs. Alabama, 218 U. S., 124.
Brennan vs. Titusville, 153 U. S., 289.
Crenshaw vs. Arkansas, 227 U. S., 389.
Schollenberger vs. Pennsylvania, 171 U. S., 1.
Stone vs. State, 117 Ga., 292; 43 S. E., 740.
Henderson vs. Ortte, 38 So., 440; 114 La., 523.
Turner vs. State, 41 Tex. Crim., 545.
Re Spain, 47 Fed., 208.
City of Huntington vs. Mahan, 142 Ind., 695.
Martin vs. Town of Rosedale, 130 Ind., 109.
McLaughlin vs. City of South Bend, 126 Ind., 471.

Dillon on Municipal Corporations, 5th Edition, p. 2328, Section 1356, says:

"Various decisions are to be found by courts of different states which purport to sustain a tax upon canvassers or drummers selling goods to be afterwards brought within the

state, where the goods have been shipped in bulk to the agent or drummer or to a distriubuting agent and have been by him delivered to the purchaser and instead of being shipped directly to the purchaser from without state; *but any supposed ground of distinction* based upon the fact that the goods *are shipped to the salesman or distributing agent in bulk and by him assorted and delivered to the purchasers, has been rejected by the Supreme Court of the United States, which has declared that the grounds of distinction are not sufficient to remove the transactions from the domain of interstate commerce.*"

It is, therefore, undoubtedly true, that the general business conducted by the plaintiff-in-error on July 8, 1915, in the City of Munising was interstate commerce. This much is admitted in the decision of the Circuit Judge and is shown by the cases above cited, principally the decision of the District Court of Oregon in the case of the Grand Union Tea Company vs. Evans, and the case of Mt. Holly Springs Borough vs. Wilt, in Pennsylvania.

It was conceded that the total value of the goods delivered on that day by the plaintiff-in-error was $66.75, all of which were without the State of Michigan at the time the orders were taken, with the exception of two jars of toilet cream amounting to 50¢. This makes a proportion of 1/133. *We should also remember that he was on the same occasion soliciting orders for goods to be delivered a month later,* and while the testimony does not show the amount of orders which he took, it would be reasonable to suppose that they were of a similar amount.

So that of all the business which he transacted in the City of Munising on the day in question, the proportion of the goods which were within the state would be 1/266. Upon that very small fraction, the Supreme Court of Michigan placed its decision holding that the plaintiff-in-error had peddled goods and refused to consider the other parts and elements of the transactions.

Cases Distinguished.

While it is the contention of the plaintiff-in-error that the case of Stewart vs. Michigan, 232 U. S., 665, has radically modified the law of that state as to the necessity of procuring a license for solicitors of non-residents, still at the same time, the case at bar can be distinguished from all of the Michigan cases which have upheld municipalities in requiring licenses from solicitors.

The case of the City of Muskegon vs. Zeerup, 134 Mich., 181, is distinguished from the one at bar in the following important particulars:

(1) There was no showing as to the lapse of time between the taking of the orders for goods by the solicitor and delivery of goods so ordered to the respective customers. There was no claim that at the time the solicitor took the orders for the goods that the goods so ordered were out of the State of Michigan at the time the order was taken.

(2) In that case the company shipped the goods to the solicitor, while in this case the company shipped the goods to itself in care of the solicitor.

(3) There was no showing in that case that the merchandise of the retail store was kept separate

from the other business transacted through solicitors.

(4) It was not shown that the goods were continually in transit and that the business consisted of continually recurring orders.

The case of Depres, Bridges & Noel vs. Zierleyn, 163 Mich., 399, is distinguished from the one at bar in the following particular: The goods were brought in bulk and exhibited for sale by the agents, sold and delivery made from the stock in hand. The court said, p. 402: "It was not the case of a sale of goods by sample, in the domestic state, by a foreign corporation, through itinerant salesman, because the goods were not only sold but delivered at the same time."

In the case of People vs. Smith, 147 Mich., 391, the agent had been doing business with the Grand Union Tea Company, through a branch store at Grand Rapids, Mich. The company had been paying a license fee for the defendant and on hearing that it was to be increased from $5.00 to $10.00, the agent was instructed to order his goods from Toledo. The court held that the method employed in sending goods to respondent was an attempt to evade a local regulation and was not a good faith engagement in interstate commerce. It also appeared clear that the defendant *sold some goods out of stock on hand.*

In City of Muskegon vs. Hanes, 149 Mich., 460, there was no interference with interstate commerce in requiring a license of one who distributes articles or merchandise, shipped here in bulk from another state, to be returned or paid for at a later date to an *associate* of the distributor.

In People vs. Sawyer, 106 Mich., 428, the sales were made from a general stock of goods kept within the state.

In Grand Union Tea Company vs. City of Iona, 130 N. W., 339, the goods were stated to be within the State at the time of sale and were sold from such a stock on hand.

The Michigan cases were also decided on the ground that the company was a resident of the State because it had been authorized to do business therein—a proposition which we feel assured that this Court will not agree with. If that were true there would be no such thing as a foreign corporation for the purpose of giving a Federal court jurisdiction and it would be possible for any foreign corporation to receive its State license and it would then be considered a domestic corporation and would be treated as such in all courts of law.

In the Smith case it also appears that the court did not believe that the transaction of sending goods within the State was done in good faith and for no purpose except to make the transaction one of interstate commerce. There can be no such question in the present case because all of the business within the State is done in the same manner, and the facts show it to be the general course of business and not a special circumstance.

The case of the American Steel & Wire Company vs. Speed, 192 U. S., 500, is frequently quoted as authority against the contention of the plaintiff in error and as it will probably be relied upon by the respondent, we take this occasion to distinguish it:

(1) The Speed case was one covering the taxation of the property itself, and not the occupation of selling it.

(2) The goods came within the state before orders were taken for the same, which alone distinguishes it from the case at bar.

(3) In the Speed case the customers still had a right to select the grade of nails after the goods came within the state. This is not true of the business of the Grand Union Tea Company and when orders are given to agents by its customers, they are specific as to the kind of coffee, tea, soap, etc., that is desired.

(4) It appears in the Speed case that a warehouse was used for storage purposes until the goods were sold and it did not appear that the goods were sold before they came into the state. This is not true in the case at bar as orders have been taken for the specific goods before they come into the State of Michigan. The goods come to Ishpeming subsequent to giving the orders to the agents, and usually after the orders are transmitted to the Ispheming store.

(5) If the Grand Union Tea Company contended that it should not pay taxes to the City of Ishpeming on the goods handled by the agents and going through the Ishpeming store, it would be on a parity with the Speed case, but we do not contend that. On the other hand we pay such taxes without any question as we think it our duty to bear a just proportion of the public debt on our property within the state, but what we do object to is the *taxation of the right to sell those goods before they come into the state.*

(6) In the Speed case, the goods had reached their destination and were held for sale, whereas in the present case, the goods do not reach their des-

tination at Ishpeming and are not held there for sale, as the sale has previously taken place and they are simply on their way to consummate the transaction.

POINT II.

The general course of business, not an isolated transaction, should determine the interstate commerce character.

INTERSTATE COMMERCE IS A PRACTICAL, NOT A TECHNICAL LEGAL CONCEPTION.

In the case at bar, the evidence showed that only two jars of toilet cream of the value of 50¢ out of a total delivery of $66.75 were within the State when the order for them was taken. It also appeared that the toilet cream was a new item of merchandise and that orders for it were seldom taken and that the general business of the Grand Union Tea Company and of the plaintiff in error consisted of selling tea, coffee, soap, spices, etc.

This point was particularly passed upon in the case of the Grand Union Tea Company vs. Evans (supra) in the Federal Court of Oregon quoted in the preceding point. In that case the company conceded that the tea and coffee were not kept separate and apart from the goods in the solicitors' department, but were mingled with the goods in the retail department. This was for the sake of cleanliness and convenience, and the Court properly held that it was a mere detail of the business

and did not affect its general character. Even more strongly in that case it appeared that goods not of a perishable nature, such as soap and baking power, were sent from the home office in Brooklyn to Portland by water. That these goods were to some extent kept in stock, but the orders in the Portland store were not greater than could be received in convenient car load lots. That practically all of the other goods were outside the State of Washington at the time the orders were taken. The Court said:

> "In every case with the possible exception of soap and baking powder, which is only a small part of the gross business of the plaintiff, the goods when the orders are taken are without the State."

The Court held this did not affect the general character of the business, which was interstate commerce.

In the case at bar the plaintiff in error showed not only that practically all of the goods he delivered were without the State when he took the orders for them, but also that the general course of the business of the Grand Union Tea Company at Ishpeming was of a similar nature, that is to say, that practically all of the merchandise sold by the nine solicitors working for the Ishpeming store is without the State of Michigan at the time the orders for them are taken. The Supreme Court of Michigan held, nevertheless, that the two jars of toilet cream governed the entire character of the busines and made it peddling. That is absurd. *We earnestly urge that this is an exceedingly technical conception and that the Federal Courts have*

taken and should take a broad view of the general business and determine the legal rights accordingly.

In Davis vs. Virginia, 236 U. S., 697, the Supreme Court of the United States, re-iterated its former decisions *that interstate commerce is a practical and not a technical conception.* That it is the main business, not incidents of the business, that determine the character of the act. That it is the principal character of the business, not the exception, that controls. In that case an agent sold a portrait and gave the purchaser an option to buy one of three frames without requiring him to buy any. The portrait was shipped in one parcel, the three frames in another. Davis was convicted in the State Court of selling frames without a license. The Supreme Court of the United States, in reversing the decision, on page 698, said:

> "The Court below thought that the purchase of the frames was to be regarded as a separate transaction, occurring wholly in Virginia. Whether or not this was its technical aspect as an executed contract, it often has been pointed out that commerce among the States is a practical, not a technical, conception."

In Rearick vs. Pennsylvania (1906), 203 U. S., 507, an ordinance of the Borough of Sunbury, in the State of Pennsylvania, was held invalid which undertook to make it unlawful to solicit, on the streets or by traveling from house to house, orders for the sale or delivery at retail of foreign or domestic goods, not of the party's own manufacture or production, without a license, for which a fee was charged. It was undertaken in that case to

apply the ordinance to Rearick, who solicited the orders for brooms, which were shiped from Columbus, Ohio, to fill the orders solicited, the brooms being tagged and marked according to the number ordered and held together in bundles of about a dozen for shipment.

Although the original packages were broken within the state, and the brooms used to fill the various orders, irrespective of any particular broom going to fill any particular order, yet the transaction was held to be interstate commerce, the soliciting of the order itself being such an act.

Mr. Justice Holmes said, page 511:

> "Hence, the prosecution, whatever its assumption on the point last mentioned, sought to show that there was no sale until the goods were delivered and the cash paid for them. The Superior Court contented itself with the suggestion that the contract would have been satisfied by the delivery of the articles corresponding with sample, although bought at the next door. The argument submitted to us goes farther and affirms that the order was not accepted and did not bind the corporation until the delivery took place.
>
> "The answer to the latter of the two positions just stated is simple. The fair meaning of the agreed fact that the orders were given to agents employed to solicit them, is that the Company offered the goods and that the orders were acceptances of offers from the other aside. If there were the slightest reason to doubt that the contracts were made

with the Company through its authorized agent at the moment when the orders were given, which we do not perceive that there is, certainly the contrary could not be assumed in order to sustain a conviction * * * *Commerce among the several states is a practical conception not drawn from the witty diversities of the law of sales.* The brooms were specifically appropriated to specific contracts in a practical, if not in a technical, sense. Under such circumstances, it is plain that whatever might have been the title the transport of the brooms for the purpose of fulfilling the contract was protected commerce."

In Swift & Company vs. United States, 196 U. S., 375, the Court said, on page 398:

"It is said that this charge is too vague and that it does not set forth a case of commerce among the states. Taking up the later objection first, *commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.*"

In Dozier vs. Alabama, 218 U. S., 124-128, the Court said:

"What is commerce among the states is a question depending upon broader consideration than the existence of a technically binding contract or the time and place where the title passed."

In Crenshaw vs, Arkansas, 227, U. S., 389, 400, the Court said:

> "We must look, however, to the substance of things, not the names by which they are labeled, particularly in dealing with rights created and conserved by the Federal Constitution and finding their ultimate protection in the decisions of this Court."

In Texas & N. O. R. R. Co. vs. Sabine Tram. Co., 227 U. S., 111, 126, the Court said:

> "The essential character of the commerce, not its mere incidents, should determine."

In Southern Pac. Terminal Co. vs. Interstate Commerce Commission, 219 U. S., 498, 526, the Court said:

> "In other words, the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the trans-shipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasion of the act of Congress quite easy."

To the same effect see

> Western Oil Refining Co. vs. Lipscomb, 244 U. S., 346, and Landon vs. Public Utilities Com., 242 Fed., 658.

As a corollary to this point, we should bear in mind the general rule that a single sale does not constitute the seller a peddler.

Watters, it will be remembered, was convicted of peddling two jars of toilet cream on this one occasion only. He was not charged nor was it claimed that he *offered* them to anyone. It is equally fair to assume that the customer had read or heard about the article and ordered it without having it offered. It was an isolated sale—a single transaction.

In this connection the following case is so important that it is quoted in full:

In re Houston; in re Gerye, 47 Fed., 539, the Court said:

> "This is an application for the writ of habeas corpus, the parties making separate applications; but, as the cases involve the same question of law, and arise out of substantially the same state of facts, they will be considered together.
>
> "Petitioners were arrested and imprisoned under proceedings instituted against them in a justice's court at the city of Nevada, Vernon county, in this state. The prosecution is predicated on an alleged violation of the state statute defining and regulating the rights and duties of peddlers. The charge is that the defendants were engaged in the act of peddling wares and merchandise in said city and county without having first taken out therefor a ped-

dler's license. The facts, as developed on this hearing, are substantially as follows:

"The petitioners are citizens of the State of Kansas, and at the time of their arrest they were acting as agents for Price & Buck, merchants of the City of Topeka, State of Kansas, a firm engaged in the general mercantile business at Topeka, making a specialty, however, of the sale of clocks, silver-ware, and lace curtains. In the prosecution of their business, this firm employed a large number of canvassers, throughout the country, extending into other States. These canvassers were furnished with samples of the goods to be sold, which they carried around with them from house to house, soliciting custom. The terms of sale were one-sixth in cash, the remainder to be paid in five equal monthly instalments. The first payment was made to the solicitor, which represented the amount of his commission. An order was then sent in by the agent, or drummer, to the house at Topeka for the article contracted for, upon which the firm shipped to the agent, who delivered to the purchaser, and the remaining payments were collected by a collecting agent of the firm.

"In the case of the petitioner Houston, the evidence does not show that he ever made sale otherwise than according to the custom above indicated.

"In the case of the petitioner Gerye, the evidence shows that, while he pursued a like course, there was one exception, when he offered to sell to a lady the sample clock carried around by him. She declining to take it, he

went to a neighboring house, and made sale to the lady of the house, delivered the clock immediately to her, receiving from her the first payment of one-sixth of the purchase price.

"The right of a non-resident merchant to thus employ agents to go beyond the limits of the State in which the merchant resides to solicit purchases, by taking orders on the house, to be filled, and the goods shipped into another State for delivery, without the goods being subject to a license tax of the State, or to an occupation tax on the solicitor, has been established beyond further controversy, by decisions of the Supreme Court of the United States. *Robbins* vs. *Taxing Dist.*, 120 U. S., 489, 7 Sup. Ct. Rep., 592; *Leloup* vs. *Port of Mobile*, 127 U. S., 640; *Asher* vs. *Texas*, 128 U. S., 129.

"The method of sending solicitors into another State for orders of sale, employing samples for exhibition, is one of the recognized lawful methods of carrying on trade between the different States; and if the local community where the solicitor thus goes may subject him to an occupation tax or a license fee, no matter by what name or under what disguise, whether as peddler or merchant, who shall limit the amount of such tax, to prevent actual prohibition? As said by the Court in *Robbins* vs. *Taxing-Dist.*, supra: 'To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things.'

"There was no question made by respondent at the hearing of this case that, if the conduct

of the petitioners was strictly limited or confined to the mere solicitation of orders, in the manner stated, the acts of petitioners are within the protection of the commerce clause of the federal constitution. But the principal contention was and is that the act of Gerye, in making sale of one clock without taking an order therefor on the house, according to the instruction of the house and the custom of the agents, brings his case within the definition of a peddler, and subjects him to the operation of the state law. The state statute thus defines a peddler:

> 'Whoever shall deal in the selling of patents, patent-rights, patent or other medicine, lightning rods, goods, wares, or merchandise, except books, charts, maps, and stationery, by going from place to place to sell the same, is declared to be a peddler.'

"It is to be observed that it is essential under this statute to constitute a peddler that he should 'deal in the selling' of the given article. *The question, therefore, presents itself, whether the single instance of Gerye delivering the clock which he carried as a sample, without first sending in an order to the Topeka house, and awaiting the shipment of its counterpart, constituted him a peddler under this statute,* so as to deprive him of the protection which the constitution gives to interstate commerce. At first impression it seems plausible that one offer to sell and deliver, and then one sale, followed delivery, would constitute a dealer. As applied to the statute regulating the sale of liquors under

the federal revenue law, such acts would be sufficient to constitute the vendor a retail liquor dealer. But the rule of construction, under like state statutes, is quite different. The language of Endicott, J., in *Com.* vs. *Farnum*, 114 Mass., 267-271, in construing a like provision, and discussing a like state of facts, may well be applied here:

> "'He was an agent soliciting orders, and a carrier delivering machines ordered. He made no direct sales himself. He did not carry and expose goods for sale, within the mischief the statute is intended to prevent. The article he carried was a sample of that which he proposed the purchaser should buy of the company. *The fact that he occasionally delivered the sample machine to a purchaser desirous of obtaining one immediately cannot so change the character of his business as to bring it within the statute, nor did the fact that he sold one attachment, and one tuck-marker, capable of being attached, make him liable;* it distinctly appearing that it was not his practice to make such sales. The question is to be determined on the general character and scope of his business. If this does not bring him within the statute, he is not liable for single sales of particular articles, such sales being exceptional, and not in the course of his ordinary employment.'

"See, also, *City of Kansas* vs. *Collins*, 34 Kan., 434-437, 8 Pac. Rep., 865, and cases cited.

"Such seems to be the well-settled rule of construction of similar statutes. *To hold that such sporadic, casual sale fixes upon the party the office of a dealer does not obtain outside of the practice under the revenue laws,* which are designedly rigid, and controlled by the letter of the act. The cases of *State* vs. *Emert,* 103 Mo., 241, 15 S. W. Rep., 81, and *Hynes* vs. *Briggs,* 41 Fed. Rep., 468, are not in conflict with the views above expressed, when properly distinguished. The agreed statement of facts on which the former case was submitted is not as clear as it ought to have been to present an exact point for decision. While it is true the facts stated indicate that the agent was soliciting orders for the non-resident manufacturer, and that in traveling around from house to house he did sell out of his wagon one sewing-machine, it perhaps, in justice to the opinion of the court, ought not to be said that it held such single sale constituted the vendor a peddler under the state statute. The holding would be singular in that aspect, as it would be in conflict with the current of state authorities construing similar statutes. The third paragraph of the agreed statement of facts recites that the property 'was forwarded to this State by said company, and delivered to defendant, as its agent, for sale on its account;' from which it is inferable that it was not being used merely as a sample, but was sent by the manufacturer to be sold, and, therefore, was sold in the usual course of defendant's trade. It is not necessary that all that is said in that opinion should receive as-

sent or any part disapproval to warrant the conclusion reached on the facts at bar.

"In the case of *Hynes* vs. *Briggs*, the facts were that the non-resident merchant and manufacturer, while employing agents as canvassers, shipped into the State of Arkansas large consignments of said goods, which were stored in a warehouse, and sales made by its solicitors were filled from this store-house, and were not completed by shipments from without on orders sent in by the solicitor. Such goods were held to have become so far mingled with the common property of the situs as to become liable to state regulation and police, and subject to the license tax, if otherwise constitutional as a state enactment.

"Whether it will be maintained by the Supreme Court that a solicitor for a non-resident merchant or manufacturer, who limits his operations to merely taking orders on such non-resident, who supplies the goods from a provisional store-house established within the State where such orders are taken, would thereby become liable to a license fee imposed by the State, is yet an open question. It is sufficient for the purpose of the case at hand to say that Mr. Justice Bradley, in *Robbins* vs. *Taxing-Dist.*, supra, suggested that it could not be entertained that the non-resident merchant or manufacturer, in order to avail himself of the right of free interstate commerce guaranteed by the constitution, should be driven to the 'silly and ruinous proceeding' of procuring a store-room, and shipping in his goods, before he could reasonably an-

ticipate a demand for them; and that, therefore, the means of effecting such sales through the agency of 'drummers' taking orders in advance are permissible, and the right is not to be interfered with nor hampered by subjecting the solicitor to the imposition of a state license fee, or tax in other form. This view was sustained by the majority opinion, and re-affirmed in *Asher* vs. *Texas*, 128 U. S., 129, 9 Sup. Ct. Rep., 1. The latest holding must be the law for the government of this court, until reversed by the court of last resort.

"It results that, the petitioners being restrained of their liberty in contravention of the third clause of section 8, art. 1, of the federal constitution, which gives to congress alone the power to regulate commerce among the several States, they are entitled to be discharged therefrom.

"It is accordingly so ordered."

The Gerye case is quoted in full because it is so similar to the case at bar. *In that case, however, the clock was actually sold and delivered from the wagon. No previous order had been taken for it according to the custom of the agent, yet it was held that it was an isolated sale and did not destroy the general interstate character of the business.* In the case at bar the two jars of toilet cream were not sold off the wagon, were only a very small part of the entire delivery and were sold according to the usual custom of the business except in their particular case, they were within the state when ordered. They were not

repeatedly offered to several people as were the clocks, and had not been exposed for sale or mingled with other property within the state.

Even the State Courts recognize this doctrine.

Other cases holding that a single act of selling does not make the seller a peddler are

21 Cyc., 369.

Ill. — Bacon vs. Wood, 3 Ill., 265.

Iowa — Spencer vs. Whitting, 68 Iowa, 678.

Ky. — Hays vs. Com., 107 Ky., 655.

N. Y. — People vs. Jarvis, 19 N. Y. A. D., 466.

Pa. — Com. vs. Edson, 2 Pa. Co. Ct., 377.

S. C. — State vs. Belcher, 1 McMull., 40.

— State vs. Moorehead, 42 S. C., 211; 26 L. R. A., 585.

Eng. — Rex vs. Little, 1 Burr., 609.

Ga. — Kimmel vs. Americus, 105 Ga., 694.

Kan. — Kansas City vs. Collins, 34 Kan., 434.

Mass. — Com. vs. Farnam, 114 Mass., 267.

— Com. vs. Ober, 66 Mass., 493.

Ind. — Alcott vs. State, 8 Blackf., 6.

Mo. — Page vs. State, 6 Mo., 205.

N. C. — Comm'rs vs. Pettijohn, 15 N. C., 591.

— State vs. Chadbourn, 80 N. C., 479.

— State vs. Ray, 109 N. C., 736; 14 L. R. A., 529, and note citing many cases holding that a single transaction does not constitute "dealing" or "carrying on business."

POINT III.

The goods are continually in transit from the time of leaving the headquarters of the Grand Union Tea Company at Brooklyn, New York, until they reach the ultimate consumer in Michigan, which also makes it interstate commerce.

The theory of Continuity of Transportation applies to the present case. This subject will be discussed with reference to the *Monopoly Cases*, *Pure Food Cases*, *Freight Rate Cases* and *Gas Transportation Cases*.

We should remember that the whole course of trade should be considered and not a single transaction.

It appears from the evidence briefly that at the time the plaintiff in error was arrested that the Grand Union Tea Company had nine solicitors working for the Ishpeming store; that they worked along regular routes sending their orders into the store; and that each week the store ordered from headquarters in New York; that at the time the orders were taken by the solicitors, the goods were without the State of Michigan; that the orders from the agents occurred with such regularity and frequency that the manager of the store could estimate by experience how many orders would come in each week and he anticipated the receipt of these orders by a few days only by ordering the goods from New York; that this was not an isolated transaction or one order sent to New York, but it was a constantly recurring business which the manager could conduct so accurately through his

experience that the freight received one week was practically exhausted in the solicitors department when the freight for the next week was received.

It should also be remembered that there was no stock in the solicitors department; that the orders from the agents each week were matched up with the merchandise received from New York and no stock carried over into the next week; that the solicitors department was kept separate and apart from the retail department and that the merchandise in the solicitors department was not exposed or offered for sale, but only divided up from bulk into convenient packages for delivery by the agents.

This shows that the goods were continually in transit from the time they left New York until they were in the hands of the customers, stopping only long enough in the solicitors department to be split up into smaller packages and matched up with the orders which were on hand and which came in during that week. When we remember that the orders were taken by the agents for delivery a month thereafter, we can readily see and understand why it would have been unbusinesslike and impractical for the company to maintain a large stock in the store and we can also readily understand how the goods were outside of the State of Michigan when the orders were taken. It is evident that the company would not have sent merchandise each week to this store if the company did not expect through experience to find orders waiting there to be filled. As said in Robbins vs. Shelby Taxing District, it would be foolish to insist that the merchandise must be within the state before an order for it is taken and also that to

tax the soliciting of an order for goods which are without the state is a very different thing from taxing the property itself.

There can be no doubt that the general course of the business showed that the goods were continually in transit.

Monopoly Cases.

On July 2, 1890 (C. 517, 26 Stat., 209) Congress passed a law "to protect trade and commerce against unlawful restraints and monopolies." The authority was based on the right to regulate commerce between the several states. In enforcing this statute the United States Supreme Court said in Swift & Co. vs. U. S., 196 U. S., 375, 398:

> "So far it has not been necessary to consider whether the facts charged in any single paragraph constitute commerce among the states or show an interference with it. There can be no doubt, we apprehend, as to the collective effect of all the facts, if true, and if the defendants entertain the intent alleged. We pass now to the particulars, and will consider the corresponding parts of the injunction at the same time. The first question arises on the sixth question. That charges a combination of independent dealers to restrict the competition of their agents when purchasing stock for them in the stock yards. The purchasers and their slaughtering establishments are largely in different states from those of the stock yards, and the sellers of the cattle, perhaps it is not too much to assume, largely in

different states from either. The intent of the combination is not merely to restrict competition among the parties, but, as we have said, by force of the general allegation at the end of the bill, to aid in an attempt to monopolize commerce among the states.

"It is said that this charge is too vague and that it does not set forth a case of commerce among the states. Taking up the latter objection first, *commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.* What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. *And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated.* See *Norfolk & Western Ry.* vs. *Simmons,* 191 U. S., 441. But the sixth section of the bill charges an interference with such sales, a restraint of the parties by mutual contract and a combination not to compete in order to monopolize. It is immaterial if the section also embraces domestic transactions.

"It should be added that the cattle in the stock yards are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co.* vs. *Speed*, 192 U. S., 500."

The whole transaction should be considered. Suppose that the Government was prosecuting the Grand Union Tea Company for creating a monopoly in restraint of trade. Suppose the company, by reason of its economical management, its enormous and widespread business, its ability to buy and manufacture in large quantities, its absolute control of the wholesale market for these commodities, did actually have a monopoly of the business in the United States, it would then be in the same class as Swift & Company. Under that decision would anyone seriously dispute that it was engaged in interstate commerce? A contract is a contract. Interstate commerce is interstate commerce. It cannot be one thing one moment for one purpose and another thing at another moment for another purpose. If the Grand Union Tea Company is engaged in interstate commerce for the purpose of enforcing the Anti-Trust or Monopoly laws, it is engaged in the same trade and entitled to equal protection from unconstitutional state laws, or ordinances passed under their authority. If the Government wished to prosecute the company it would quickly enough contend, and successfully too, that it was engaged in interstate commerce on one or all of the grounds herein claimed.

Swift & Co. vs. U. S., 196 U. S., 375;
Loewe vs. Lawlor, 208 U. S., 274;

Addyston Pipe & Steel Co. vs. U. S., 175 U. S., 211, 242;
Montague & Co. vs. Lowry, 193 U. S., 38, 45;
U. S. vs. Trans.-Mo. Freight Assn., 166 U. S., 290; U. S., vs. Joint Traffic Assn., 171 U. S., 505;
7 Cyc., 417, and many cases cited.

If Congress has the power to declare that "every contract" in restraint of trade is interstate commerce and unlawful, then certainly the parties to those same contracts which, if done with sufficient magnitude or unlawful intent, would be criminal, has an equal right to say they are entitled to the benefits of their acts.

Pure Food Cases.

Let us now see how the Government has taken jurisdiction on the ground of interstate commerce and widely legislated to protect Food and Drugs.

In this connection the Court is referred to the case of *McDermott* vs. *Wisconsin*, 228 U. S., 115, decided April, 1913, and commonly known as the Karo Corn Syrup Case.

In that case, it will be remembered, title to the cans of syrup had changed within the State of Wisconsin and that the cans had been taken from their packing cases and placed on the shelves of the retail store and exposed and offered for sale. Nevertheless, the Court held that the goods were still in interstate commerce for the purposes of the National Food and Drugs Act so far as the Food and Drugs Act of Wisconsin conflicted with it.

This case is of interest because it shows how the merchandise continued in interstate commerce until it reached the hands of the consumer even though title had changed. In the case at bar title did not change until actual delivery and the goods were not offered for sale while within the State.

The following quotations from the McDermott case emphasize these points (page 130):

> "* * * *That the word 'package* or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what constitutes misbranding within the meaning of the act, *clearly refers to the IMMEDIATE CONTAINER of the article which is intended for consumption by the public, there can be no question.* And it is sufficient, for the decision of these cases, that we consider the extent of the word package as thus used only, and we therefore have no occasion, and do not attempt, to decide what Congress included in the terms 'original unbroken package' as used in the second and tenth sections and 'unbroken package' in the third section. *Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed,* and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation.
>
> "* * * While this is true, it is equally well settled that *the State may not, under the*

guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the State law iterferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution. Texas & Pacific Ry. Co. vs. *Abilene Cotton Oil Co.*, 204 U. S., 426; *Northern Pacific Ry. Co.* vs. *Washington*, 222 U. S., 370; *Southern Ry. Co.* vs. *Reid*, 222 U. S., 424; *Second Employers' Liability Cases*, 223 U. S., 1; *Savage* vs. *Jones* * * *

"* * * *To determine the time when an article passes out of interstate into state jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a Federal prohibition, becomes immune.* It was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to chose appropriate means to that end. *The legislative means provided in the Federal law for its own enforcement may not be thwarted by State legislation having a direct effect to impair the effectual exercise of such means.*

"For the reasons stated, the statute of Wisconsin in forbidding all labels other than the one it prescribed, is invalid."

The case above is especially applicable to the present case, because the business of the Grand

Union Tea Company is directly subject to the Pure Food Law. In selling flavoring extracts, baking powder, teas, coffees, cocoas, spices, etc., the Grand Union Tea Company's principal concern is to manufacture goods free from adulteration and to sell them honestly without misbranding. Everyone admits that its merchandise and labels must conform to Government standards, first and foremost, then to the State standards. *If the company is not engaged in interstate commerce, then it is not subject to the Federal Food and Drug Act. If the company is not entitled to the relief demanded, then it is not liable for violations of the National Food laws.*

If it is interstate commerce in New York State to send goods to Michigan for sale to the consumer, title being retained all the time, then it is just as much interstate commerce in Michigan to receive and deliver those same goods. In fact, there can be no such thing as interstate commerce *in* a State, but only *between* States. The whole transaction is to be looked at. The simple question is, "Did the goods move from one State to another to fill orders taken while the goods were still without the State?" That is our case exactly.

This line of argument naturally leads us to the *intent* with which the goods were shipped, and to the so-called Freight Rate Cases.

Freight Rate Cases.

The last case, which reviews pretty thoroughly the previous cases on the subject is *Texas & N. O. R. R. Co.* vs. *Sabine Tram. Co.*, 227 U. S., 111. *As this case is so irresistibly convincing that goods*

which are intended to be and are actually continually in transit, especially when the same is a constantly recurring current of business is interstate commerce, the opinion will be quoted nearly in full.

Mr. Justice McKenna, said (page 122):

> "If we may regard the essential character of the shipments we can have no hesitation in pronouncing them to have been in interstate commerce. This conclusion seems indeed to be determined by the last finding of fact. It is there declared that 'the shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, *constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine.*'
>
> "If the shipments were foreign commerce it is hardly necessary to make explicit the principle that the national dominion over them was supreme; and, conversely, if the shipments were not of that character they were subject to the regulating power of the state.
>
> "The shipments having the character of foreign commerce when they passed 'out through the port of Sabine,' when did they acquire it? We have had occasion to express at what point of time a shipment of goods may be ascribed to interstate or foreign commerce and decided it to be when the goods have actually started for their destination in another state or to a foreign country, or delivered to a carrier for transportation. *Coe* vs. *Errol,* 116 U. S., 517; *Southern Pacific*

Terminal Co. vs. *Interstate Commerce Commission*, 219 U. S., 498, 527.

"The Sabine Company, while not denying this general test, urges a more special one as applicable to the case at bar. The company contends that the supreme test is, 'Was the lumber, when it left Ruliff, actually launched on its journey, to a point in Europe; that is to say, was it committed, by the contract or by any arrangement, between the shipper and the railroad company, or provided for by either, to a common carrier for transportation on its continuous and final journey to a destination beyond Sabine, Texas?' Answering this question in the negative, it is contended that the contract of shipment did not contemplate, provide for, or even intend that the freight should go beyond Sabine 'through the agency of that shipment.' Nor, it is further contended, were there any means or arrangements for its movement beyond that point that being left to an intervening third party and a subsequent act after it was delivered to Powell Company, as it was intended to be, at Sabine; and 'it took the intervention of a new and independent shipment, arrangement, or contract, to move it beyond that point.'

"Fortifying the contentions, it is said that the existence of the conditions expressed is made the test of foreign commerce by the Interstate Commerce law, its first section reading: 'that the provisions of this Act shall apply * * * to the transportation * * * of property shipped from one place in the

United States to a foreign country and carried from such place to a point of transshipment, or shipped from a port of entry either in the United States or any adjacent foreign country.' Freight is never shipped, in the sense of the law, it is further contended, until it is launched upon its final continuous trip to a foreign country. These contentions would seem to be tantamount to saying that a local bill of lading determined the character of the commerce, but counsel especially exclude this conclusion. They admit 'that there may be some additional or outside arrangement for a continuous final movement to a destination beyond that named in the bill of lading, or the bill of lading may itself note a forward continuous movement beyond the destination named.' *It appears therefore, that continuity of movement is the chief insistence and test of the Sabine Company, not necessarily, it is explained, in point of time or free of delays, but 'an unbroken movement, proceeding under the original arrangement, or shipment.'*

"The elements of the contentions are somewhat difficult to estimate. So far as they depend upon the character of a bill of lading and that it had no provision for carriage beyond the local destination, they are answered by *Southern Pacific Terminal Co.* vs. *Interstate Commerce Commission*, 219 U. S., 498; and *Ohio Railroad Commission* vs. *Worthington*, 225 U. S., 101. They are also answered by the following Texas cases: *State* vs. *Southern Kan. Ry. Co.*, 49 S. W. Rep., 252; *State* vs. *International & Gt. Nor. R. Co.*, 71

S. W. Rep., 994; *Gulf, C. & S. F. Ry. Co.* vs. *Fort Grain Co.*, 72 S. W. *Rep.*, 419; *Same* vs. *Same*, 73 S. W. Rep., 845.

"That there must be continuity of movement we may concede, and to a foreign destination intended at the time of the shipment. Indeed, all of the elements of the contentions of the Sabine Company are well illustrated by Southern Pacific Terminal Co. vs. *Interstate Commerce Commission and Ohio Railroad Commission* vs. *Worthington, supra.*

"In the former case we cited *Coe* vs. *Errol*, and decided that its principle was not defeated by the fact that the shipments were not made on through bills of lading. The case (Terminal Case) is instructive as well in its facts as in its principle. The product involved was cotton seed cake and cotton seed meal accumulated at the wharves of the Terminal Company at Galveston and *the cake there manufactured into meal.* The cake and meal were purchased in Texas and neighboring States, but chiefly in Texas, and shipped on bills of lading and way-bills to the purchaser and manufacturer, showing the point of destination to be Galveston. *The purchases were made for export,* there being no consumption of the products at Galveston. The sales to foreign countries were sometimes for immediate and some times for future delivery, irrespective of whether the products was on hand at Galveston. At times it was on hand. At other times orders had to be filled from cake purchased in the interior and then in transit, which, upon reaching Galveston, had

to be ground into meal and sacked, and for the meal thus ground and sacked or thus bought ships' bills of lading were made. It was contended that the transit of the cake and meal absolutely ended at Galveston, that point being their final point of concentration and manufacture, the cake being there manufactured and sacked for export. The contention was rejected by the application of the principle which we have expressed. The points of resemblance between that case and the one at bar are obvious. Are the points of difference essential? In both cases the article was intended for export but had no definite foreign destination, nor had it been 'committed to a common carrier for its final continuous voyage to a foreign point.' In the Terminal Case the manufacturer and exporter of the products purchased them at interior points and had them shipped to himself at Galveston.

"In the present case the Sabine Company was the manufacturer and shipped them to the Powell Company, the purchaser, who paid the freight charges for the Sabine Company. Upon the arrival of the lumber at Sabine it was carried without delay beyond and unloaded into the water in reach of ships' tackle. *The continuity of the shipment was not as much broken as in the cited case. There, there was a delay for manufacturing; here, there was only such delay as was incident to transshipment from rail carriage to water carriage and to the nature of the traffic.*

It is said, however, that the Sabine Company had no connection with the lumber after

its arrival at Sabine and had no concern with its destination after it came into the hands of Powell Company and had no particular knowledge thereof. Like circumstances undoubtedly existed in *Southern Pacific Terminal Co.* vs. *Interstate Commerce Commission.* It did not prevail there and cannot prevail here. *The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation ould be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a state.* There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign.

"That it is the nature of the traffic and not its accidents which determines its character is illustrated by *Ohio Railroad Commission* vs. *Worthington, supra.* A rate of 70 cents a ton was imposed by the Commission on what was called 'Lake-cargo coal' from a coal field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie, for carriage thence by lake vessels. The shipper transported the

coal ordinarily upon bills of lading to himself, or to another for himself, at Huron, and it appeared that the coal might be accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time for the purpose of shipment out of the state. The rate of 70 cents, however, covered not only the transportation of the coal to Huron but placing it on the vessels and trimming it for its interstate journey. It was held that its transportation to Huron was an interstate carriage.

"Much stress was laid in the argument upon the fact that the coal was billed only to Huron. Replying to the contention the court said that the billing of the coal was not necessarily determinative, citing *Southern Pacific Terminal Co.* vs. *Interstate Commerce Commission, supra.*"

Gulf, Colorado & S. F. Ry. Co. vs. Texas, 204 U. S., 403, was then distinguished and the Court continued as follows:

"It is manifest that these facts were the determining ones, and the history of the corn prior to its arrival at Texarkana was put aside as irrelevant and the controlling fact decided to be that corn belonging to the Hardin Grain Company, was shipped from Texarkana to Goldthwaite, a strictly local shipment. This was the view taken of the case in *Ohio Railroad Commission* vs. *Worthington*, supra. It was there urged to sustain the contention that the manner of billing was controlling of the

character of the commerce. The contention was rejected, and, distinguishing the case and speaking of its facts, the Court said (page 109): 'The facts showed that the corn was carried upon a bill of lading from Hudson (South Dakota) to Texarkana, and that afterwards, some five days later, it was shipped from Texarkana to Goldthwaite, both points in the State of Texas. This was held to be an intrastate shipment unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite for, as this Court held, the corn had been carried to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a new contract was an independent intrastate shipment.' Distinguishing the case, it was said (page 109): 'It is evident from this statement of facts that the case is quite different from the one under consideration. There a new and independent contract for intrastate shipment was made, the interstate transportations having been completely performed. * * *'

"The facts in the case at bar are different. The lumber was ordered, manufactured and shipped for export. *And we say shipped, for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine.* Its relation to the shipment was a perfectly natural one and did not change the relation of the Powell Company to it and make the lumber other than lumber purchased at Ruliff and started from there in transportation to a foreign destination. The findings are explicit and circumstantilal as to

this. And the shipment was not an isolated one but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber and in the year 1906, 39,554,000 feet. Nor was there a break, in the sense of the Interstate Commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and in its transshipment at Sabine. *Swift & Co.* vs. *United States,* 196 U. S., 375. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments.

"Judgment reversed and case remanded for further proceedings not inconsistent with this opinion."

To the same effect, see

Southern Ry. Co. vs. Greensboro, 134 F., 882;
McNeill vs. Southern Ry. Co., 202 U. S., 543;
Chicago, M. & St. P. Ry. Co. vs. Voelker, 129 Fed., 522.

In Southern Pac. Terminal Co. vs. Interstate Commerce Commission, 219 U. S., 498, corn meal stopped in transit to be ground and sacked, yet it was intended to be continually in transit and was interstate commerce. Our case is very much stronger than that because no manufacturing is done, title does not pass until the consumer is reached, no part of the goods are offered for sale locally, and the goods move in a constantly recurring course of trade. It was not a single iso-

lated shipment, but there were weekly shipments from Brooklyn, New York to Ishpeming, Michigan to fill orders taken in Michigan prior to the departure of the goods from New York. The goods sent from Brooklyn are intended to fill certain orders. There is no waiting in Ishpeming until orders are taken, but the orders are taken while the goods are still without the State. Can any business more clearly be interstate commerce? The goods are in the possession of the Grand Union Tea Company from the time they are shipped from New York City until they are delivered to the customer in Michigan.

The Court is referred to the cases cited in the Sabine case (supra) for further authorities.

The case of the plaintiff in error is even stronger than the Sabine case, but in that case the Court said: "We regard it of no consequence that the Sabine Co., had no concern or connection with it after it reached Sabine," whereas the Grand Union Tea Company does not lose possession or title until actually delivered to the consumer, and the entire purpose and intent of the shipment was to fill customers' orders already solicited and accepted before the goods moved in transit to the State of Michigan.

Right here, let us again bear in mind that the Munising ordinance is not one for a tax upon the property, but for the occupation or privilege of handling that property. It is not, therefore, so much a question of original package doctrine as of the general character of the whole business.

A recent decision of the United States Supreme Court reiterates the principle that the whole transaction

should be considered. That case is Western Oil Refining Company vs. Lipscomb, 244 U. S., 346. It was held that a foreign corporation which shipped into the state a tank car of oil and a car load of steel barrels necessary to fill orders from two towns in the state, which had been taken by a travelling salesman, billing the cars to one town, at which the orders from there were to be and were filled, and then rebilling such cars to the other town, where the orders from that place could be and were filled—could not be subject to a privilege tax without violating the commerce clause of the Federal Constitution the intrastate transportation being both in fact and in law a connected part of a continuous interstate movement.

In the opinion, Mr. Justice Van Devanter said in part, page 348:

> "In the second part of the decision we think the Court erred. Unlike Gulf, C. & S. F. R. Co. vs. Texas, 204 U. S., 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360, this is not a case where, at the time of the original billing, the shipper had no purpose to continue the transportation beyond the destination then indicated, nor is it a suit, as was that, to penalize a carrier which rightly conformed its action to what was said in the bill of lading. On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intra-

state is determined by what is actually done, and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. *As this Court often has said, it is the essential character of the commerce, not the accident of local* or through bills of lading, that is decisive. Southern P. Terminal Co. vs. Interstate Commerce Commission, 219 U. S., 498; Railroad Commission vs. Worthington, 225 U. S., 101; Texas & N. O. R. Co. vs. Sabine Tram. Co., 227 U. S., 111; Railroad Commission vs. Texas & P. R. Co., 229 U. S., 336; Chicago M. & St. P. R. Co., vs. Iowa, 223 U. S., 334, 343; Cincinnati Street Ry. Co. vs. Covington, 235 U. S., 537, 545."

Gas Transportation Cases.

The recent case of Landon vs. Public Utilities Commission reviews so thoroughly the general principles of interstate commerce that a large extract from the opinion follows. The case was decided April 21, 1917, in the District Court of Kansas (242 Fed., 658).

The head note to the Landon case is as follows:

"Natural gas procured by a company or its receiver in one state, and piped into and sold in another state, the greater part of its cost to the company at the place of sale being the expense of transportation, is an article of "Interstate Commerce," and does not lose that

character because it is mixed in the pipes with a small quantity of gas procured in the state in which it is sold. The company or receiver conducting such business is engaged in interstate commerce, and although the gas is distributed to consumers through local companies, which receive an agreed share of the proceeds, the enforcement by the state in which the sales are made of any law or regulation fixing the price to consumers, which substantially burdens the business or renders it impossible to conduct it at a fair profit, is an undue interference with interstate commerce, in violation of the commerce clause of the federal constitution."

The opinion is by Booth, D. J., in part as follows (681):

"(A) In determining the question whether the transactions carried on by the receiver constitute interstate commerce, it will be helpful to have clearly in mind just what those transactions are. The Supreme Court of the State of Kansas in State ex rel. vs. Flannelly, supra, has stated the matter as follows:

"The gas sold by the receivers is produced in both Kansas and Oklahoma. It is transported from the wells through pipe lines beginning in Oklahoma, entering the State of Kansas near Coffeyville, at which place gas is first distributed and sold to consumers. The remainder is transported north through pipe lines into which gas from wells in Kansas is conveyed, and the gas from Oklahoma and Kansas

is then transported through the same pipe lines and through compressing stations to Independence and north and east throughout this state, and after supplying consumers in this state it is transported into the state of Missouri, where it is sold to other consumers. After the gas from this State is discharged into the pipe lines with the gas from Oklohama, it is impossible to distinguish one from the other, or to separate one from the other. About 85 per cent. of the gas sold is produced in Oklahoma, *and* 15 *per cent. is produced in Kansas.* About 60 per cent. of the gas sold in Missouri, and 40 per cent. is sold in Kansas. The gas sold in Kansas is delivered to the consumers thereof, in the several cities, by distributing companies operating under franchises obtained by the distributing companies from the cities, fixing the rates to be charged customers for gas. These distributing companies act as the agents for the Kansas Natural Gas Company in the distribution and sale of gas. The price received for gas is divided between the distributing companies and the receivers on a percentage basis. The gas is not sold by the receivers to the distributing companies. It is delivered from the pipe lines of the Kansas Natural Gas Company, under the control of the receivers, into the pipe lines of the distributing companies, and is through these pipe lines conveyed from the pipe lines of the Kansas Natural Gas Company to the consumers. The gas is consumed as fast as it is sold, and is consumed immediately after passing through the meter measuring the gas to the consumers."

"Since the decisions in Haskell vs. Kansas Natural Gas Co., 224 U. S., 217, 32 Sup. Ct., 442, 56 L. Ed., 738; West vs. Kansas Natural Gas Company, 221 U. S., 229, 31 Sup. Ct., 564, 55 L., Ed., 716, 35 L. R. A. (N. S.), 1193, and Haskell vs. Cowhan, 187 Fed., 403, 109 C. C. A., 235, it can no longer be open to question that natural gas is a subject of interstate commerce. And it seems to have been admitted by the Supreme Court of Kansas in State ex rel. vs. Flannelly, supra, and also seems to be admitted by counsel for the Commission in the case at bar, that transportation of natural gas by the receiver from Oklahoma into Kansas, and thence into Missouri, or from Kansas into Missouri, is interstate commerce; but it is claimed that at some point before the gas reaches the final consumer the transaction has ceased to be interstate commerce, and has lost its character as such. Just at what point this interstate commerce transaction loses its character as such, the Supreme Court of the State of Kansas and counsel for the Commission are not in harmony. The state Supreme Court, in the case above cited, adopted the original package idea, and attempted to apply it to the transaction in question. It said:

> 'The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Thereafter the gas ceases to be an article of interstate comerce.'

"And again:

> 'Interstate commerce is at an end when the bulk of the imported gas is broken up for

> indiscriminate distribution to individual purchasers at retail sale.'

"Counsel for the Commission, however, have repudiated the original package idea, and in their brief state: There is no original package where the transportation is conducted by means of a pipe line. Gas so conducted is not susceptible of delivery in original package.

"The position of counsel for the Commission appears to be that the transaction loses the character of interstate commerce when the gas passes from the pipe lines of the receiver to the lines of the local distributing companies. Nor do counsel for the Commission appear to lay much stress on the fact that about 6 per cent. of the gas distributed in Kansas originates in the same state. In their brief they state:

> 'We say simply that the character of this service cannot be destroyed or explained away by the fact that any amount or indeed, all the amount, of the gas distributed locally by the Kansas Natural Gas Company and its agents was obtained in other states than Kansas. Such service is still a local service, not interstate in its character, and is subject to local regulation.'

"Bearing in mind the character of the business actually carried on by the receiver and the contentions of the parties in reference to the same, let us examine some of the adjudicated cases. Most of the cases which involve the question whether a particular transaction constitutes interstate commerce deal with three separate parties: A shipper,

a carrier, and a consignee. The language used in the cases is usually framed in reference to that state of affairs. However, as will be noted later on, the existence of three such separate parties is not essential to an interstate transaction. *The following propositions, which have a bearing upon the instant case, seems to be well established:*

"(1) Interstate commerce begins when the goods are delivered to the carrier for transit from a point in one State to a point in another State, or are actually started on their ultimate passage. Coe vs. Errol, 116 U. S., 517, 525, 6 Sup. Ct., 475, 29 L. Ed., 715; General Oil Co. vs. Crain, 209 U. S., 211, 229, 28 Sup. Ct., 475, 52 L. Ed., 754, T. & N. O. R. Co. vs. Sabine Co., 227 U. S., 111, 33 Sup. Ct., 229, 57 L. Ed., 442, La. Ry. Com. vs. Railway, 229 U. S., 336, 33 Sup. Ct., 837, 57 L. Ed., 1215; Ill. Cent. Ry Co. vs. La. Ry. Com., 236 U. S., 157, 35 Sup. Ct., 275, 59 L. Ed., 517; McCluskey vs. Ry., 243 U. S., 36, 37 Sup. Ct., 374, 61 L. Ed., 578.

"(2) Interstate commerce ends when the shipment reaches its intended destination, and, except where Congress has expressly otherwise provided, the protection afforded to an interstate shipment includes the right to sell by the person introducing the goods, at least up to the time when they have become commingled with the general property of the State, and, where the goods are introduced in the original pack-

ages. Commingling does not take place until the original package is broken. Brown vs. Maryland, 12 Wheat., 419, 6 L. Ed., 678; Am. Exp. Co. vs. Iowa, 196 U. S., 133, 25 Sup. Ct., 182, 49 L. Ed., 417; Savage vs. Jones, 225 U. S., 501, 520, 32 Sup. Ct., 715, 56 L. Ed., 1182.

"(3) The intent and purpose of the party making the shipment have an important, if not controlling, bearing upon the question of where the interstate journey ends. Swift & Co. vs. United States, 196 U. S., 375, 25 Sup. Ct., 276, 49 L. Ed., 518; So. Pac. Term. Co. vs. Int. Com. Com., 219 U. S., 498, 31 Sup. Ct., 279, 55 L. Ed., 310; Ohio Ry. Com. vs. Worthington, 225 U. S., 101, 32 Sup. Ct., 653, 56 L. Ed., 1004; T. & N. O. R. Co. vs. Sabine Co., 227 U. S., 111, 33 Sup. Ct., 229, 57 L. Ed., 442; La. Ry. Com. vs. Ry., 229 U. S., 336, 33 Sup. Ct., 837, 57 L. Ed., 1215; Ill. Cent. Ry. vs. La. R. R. Com., 236 U. S., 157, 35 Sup. Ct., 275, 59 L. Ed., 517; United States vs. Ill. Cent. Ry. (D. C.), 230 Fed., 940.

"(4) A change of carriers or plurality of carriers does not affect the status of the interstate shipment. T. & N. O. R. Co. vs. Sabine Co., 227 U. S., 111, 33 Sup. Ct., 229, 57 L. Ed., 442; So. Covington Ry. vs. Covington, 235 U. S., 537, 35 Sup. Ct., 158, 59 L. Ed., 350, L. R. A. 1915F, 792; Atchison Ry. vs. Harold, 241 U. S., 371, 36 Sup., Ct., 665, 60 L. Ed., 1050.

"(5) Change of ownership of the property during transit does not

necessarily effect the status of the shipment. Swift & Co. vs. United States, 196 U. S., 375, 25 Sup. Ct., 276, 49 L. Ed., 518; Gulf Ry. Co. vs. Texas, 204 U. S., 403, 27 Sup. Ct., 360, 51 L. Ed., 540; Atchison Ry. Co. vs. Harold, 241 U. S., 371, 36 Sup. Ct., 665, 60 L. Ed., 1050.

"(6) Employment of an agent at the point of destination to effect delivery to the ultimate consignee does not destroy the character of the shipment. Caldwell vs. North Carolina, 187 U. S., 662, 23 Sup. Ct., 229, 47 L. Ed., 336; Rearick vs. Pennsylvania, 203 U. S., 507, 27 Sup. Ct., 159, 51 L. Ed., 295; Stewart vs. Michigan, 232 U. S., 665, 34 Sup. Ct., 476, 58 L. Ed., 786; Davis vs. Virginia, 236 U. S., 697, 35 Sup. Ct., 479, 59 L. Ed., 795; **Grand Union Tea Co. vs. Evans (D. C.), 216 Fed., 791.**

"(7) The time and place at which the title to the goods passes, as between the seller and buyer is not controlling upon the character of the shipment. Norfolk Ry. vs. Simmons, 191 U. S., 441, 24 Sup. Ct., 151, 48 L. Ed., 254; Penn. R. R. vs. Coal Co., 238 U. S., 456, 468, 35 Sup. Ct., 896, 59 L. Ed., 1406; Penn. R. R. vs. Sonman Co., 242 U. S., 120, 37 Sup. Ct., 46, 61 L. Ed., 188.

"(8) The parties, shipper, carrier, and consignee, may be three separate parties, or a less number. Kelly vs. Rhoads, 188 U. S., 1, 23 Sup. Ct., 259, 47 L. Ed., 359; Rearick vs. Pennsylvania, 203 U. S., 507, 27 Sup. Ct., 159, 51 L. Ed., 295; Ohio R. R. Com. vs.

Worthington, 225 U. S., 101, 32 Sup. Ct., 653, 56 L. Ed., 1004; Stewart vs. Michigan, 232 U. S., 665, 34 Sup. Ct., 476, 58 L. Ed., 786; Oil Pipe Line cases, 234 U. S., 548, 34 Sup. Ct., 956, 58 L. Ed., 1459; Kidmeyer vs. Kansas, 236 U. S., 568, 35 Sup. Ct., 419, 59 L. Ed., 721; City of Lee's Summit vs. Jewell Co., 217 Fed., 965, 133 C. C. A., 637.

"(9) Absence of a specific consignee at the time of shipment does not alter the character of the shipment. Swift & Co. vs. United States, 196 U. S., 375, 25 Sup. Ct., 276, 49 L. Ed., 518; T. & New Orleans R. Co. vs. Sabine Co., 227 U. S., 111, 33 Sup. Ct., 229, 57 L. Ed., 442; **Grand Union Tea Company vs. Evans (D. C.), 216 Fed., 791.**

"(10) The exact destination need not be fixed at the time of the shipment, provided the intent and purpose is to continue the journey beyond the limits of the state in which the journey begins. Ohio R. R. Co. vs. Worthington, 225 U. S., 101, 32 Sup. Ct., 653, 56 L. Ed., 1004; T. & N. O. R. Co. vs. Sabine Co., 227 U. S., 111, 33 Sup. Ct., 229, 57 L. Ed., 442.

"Reverting to the character of the business transacted by the receiver, it is to be noted; (a) That the shipment is started on its journey from one state to another, (b) with the purpose that it shall be delivered to a consumer. (c) That it moves continuously from a point of shipment in one state to the consumer in another state. (d) That it is moved part of the way in the pipe lines of the receiver, and part of the way in the pipe lines

of the distributing company, whether as agent of the receiver or as connecting carrier is immaterial. (e) The destination of the shipment is intended at the time of the shipment to be beyond the state, although the name of the particular consumer for any specific portion of the gas shipped is not known. (f) There is no stoppage in transportation. (g) The title to the gas remains in the receiver until delivery to the ultimate consumer.

"In substance and effect there are continuing orders by the consumers to the receiver through the distributing company to supply them with gas from the Oklahoma fields. Such transactions have the character of interstate commerce at their inception, and this character continues until final delivery. Crenshaw vs. Arkansas, 227 U. S., 389, 33 Sup. Ct., 294, 57 L. Ed., 565, and cases cited. **Even through the shipment is started before a definite order for a specific amount is given, still, the continuous and usual course of business determines the character of the shipment,** Swift & Co. vs. United States, 196 U. S., 375, 25 Sup. Ct., 276, 49 L. Ed., 518; **Grand Union Tea Company vs. Evans (D. C.), 216 Fed., 791.**

"Applying the foregoing principles to the facts in the case at bar, the conclusion follows that the transportation of gas carried on by the receiver is interstate commerce, and that the character of the business inheres from the beginning of the journey in Oklahoma to the termination thereof at the burner tips in Kansas or Missouri

"(B) *It is claimed, however, by the Commission, as above noted, that though the business of transporting gas by the receiver from Oklahoma to Kansas and Missouri may be interstate commerce in its inception, nevertheless it loses that character by reason of the local service in distributing the same in Kansas. This contention cannot be sustained. Local incidental service at the initial point of the journey does not prevent the interstate character from attaching to the shipment; nor does a similar incidental local service at the end of the journey destroy that character.* So. Pac. Term. Co. vs. I. C. C., 219 U. S., 498, 31 Sup. Ct., 279, 55 L. Ed., 310, United States vs. Ill. Cent. (D. C.), 230 Fed., 940 Penn. R. Co. vs. Clarke Co., 238 U. S., 456, 465, 468, 35 Sup. Ct., 896, 59 L. Ed., 1406; So. Ry. vs. Prescott 240 U. S., 632, 36 Sup. Ct., 469, 60 L. Ed., 836, Penn. Ry. Co. vs. Sonman, 242 U. S., 120, 37 Sup. Ct., 46, 61 L. Ed., 188; **Grand Union Tea Co. vs. Evans (D. C.), 216 Fed., 791;** City Lee Summit vs. Jewel Co., 217 Fed., 965, 133 C. C. A., 637. Nor is the business carried on by the receiver though interstate commerce in character of such inherent local nature that it is subject to the regulation and control that is sought to be imposed by the state in the instant case. It is not always easy to determine where the line must be drawn between that exertion of state power in reference to interstate commerce, which is allowable on the one hand, and that which is forbidden on the other. In Leisy vs. Hardin, 135 U. S., 100, on page 119, 10 Sup. Ct., 681, on page 687 (34 L. Ed., 128). the Court said in its opinion:

> 'Where the subject is national in its character, and admits and requires uniformity of

regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in the matter shall be free. Thus the absence of regulation as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled.'

"It is true that property, though started as an interstate shipment, may, between the point of shipment and the point of ultimate destination, cease to be the subject of interstate commerce, and become subject to state action. The length and the purpose of the interruption of the transit are to be considered in determining the question. Diamond Match Co. vs. Ontonafon, 188 U. S., 82, 23 Sup. Ct., 266, 47 L. Ed., 349, Gen. Oil Co. vs. Crain, 209 U. S., 211, 229, 28 Sup. Ct., 475, 52 L. Ed., 754. Incidental stoppage is immaterial. Kelly vs. Rhoads, 188 U. S., 1, 23 Sup. Ct., 259, 47 L. Ed., 359, Swift & Company vs. United States, 196 U. S., 375, 25 Sup. Ct., 276, 49 L. Ed., 518. It is also true that, though the shipment at its destination be unsold

and still retain its character of interstate shipment, it may nevertheless be subject to certain state action; for example, taxation in connection with taxation of general property throughout the state. Woodruff vs. Parham, 8 Wall, 123, 19 L. Ed., 382, Brown vs. Houston, 114 U. S., 622, 5 Sup. Ct., 1091, 29 L. Ed., 257. Also to inspection. But this must not be of such a character as to unduly burden interstate commerce. Minnesota vs. Barber, 136 U. S., 313, 10 Sup. Ct., 862, 34 L. Ed., 455; Patapsco Co. vs. Brd. or Agric., 171 U. S., 345, 356, 18 Sup. Ct., 862, 43 L. Ed., 191.

"But state action is not permissible in certain other directions; for example, prohibition of the sale of the goods, except by express authority through congressional enactment. Leisy vs. Hardin, 135 U. S., 100, 10 Sup. Ct., 681, 34 L. Ed., 128; Bowman vs. Railway, 125 U. S., 465, 8 Sup. Ct., 689, 1062, 31 L. Ed., 700; Lyng vs. Michigan, 135 U. S., 161, 10 Sup. Ct., 725, 34 L. Ed., 150. Even in the matter of taxation, state action is not allowable which places taxation upon "the occupation of doing a business" interstate in character. Leloup vs. Port of Mobile, 127 U. S., 640, 648, 8 Sup. Ct., 1383, 32 L. Ed., 311; Asher vs. Texas, 128 U. S., 129, 9 Sup. Ct., I, 32 L. Ed., 368. The distinction between permissible and nonpermissible state action lies in "the nature and operation of the particular exertion of state authorty," Amer. Steel & Wire Co. vs. Speed, 192 U. S., 500, 24 Sup. Ct., 365, 48 L. Ed., 538. In the case of the State Freight Tax, 15 Wall, 232, 21 L. Ed., 146, the rule was announced in the following language:

> 'Whenever the subjects over which a power to regulate commerce is asserted are in their

nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature.'

"In the case of South Covington Ry. Co. vs. Covington, 235 U. S., 537, 35 Sup. Ct., 158, 59 L. Ed., 350, L. R. A., 1915 F., 792, the Court, in passing upon a municipal ordinance governing and regulating street cars between that City and Cincinnati, Ohio, and with reference to one of the sections making it unlawful for the company to permit to ride in its cars more than one-third of the number of passengers over and above the number for which seats were provided therein, stated as follows:

'If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a pratically continuous movement of cars. As was said in Hall vs. DeCuir, 95 U. S., 485, 489 (24 L. Ed., 597) commerce cannot flourish in the midst of such embarrassments. We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this for it is clearly within its power to do so, and absence of federal regulation does

not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered.'

"As to the character of the business of transportation of natural gas, the Circuit Court of Appeals of this circuit has spoken as follows in the case of Haskell vs. Cowhom, 187 Fed., 403, 408, 109 C. C. A., 235, 240; 'Interstate commerce in natural gas, including therein its transportation among the states by pipe line, is a subject national in its character and susceptible of regulation by uniform rules. The silence or inaction of Congress relative to such a subject is a conclusive indication that it intends that interstate commerce therein shall be free, and any law or act of a state or its officers which prohibits it, or substantially restrains its freedom, is violative of the Constitution and void, Welton vs. State of Missouri, 91 U. S., 275, 282, 23 L. Ed., 347; Brown vs. Houston, 114 U. S., 622, 631, 5 Sup. Ct., 1091, 29 L. Ed., 257; Walling vs. Michigan, 116 U. S., 446, 455, 456, 6 Sup. St., 454, 29 L. Ed., 691; Case of the State Freight Tax, 15 Wall St., 232, 21 L. Ed., 146.'

"This case was cited with approval in West vs. Kansas Natural Gas Company, 221 U. S., 229, 31 Sup. Ct., 564, 55 L. Ed., 716, 35 L. R. A., (N. S.), 1193. If anything further than the foregoing statement as to the character of the business actually carried on, and the application thereto of above cited authorities, were necessary, in order to establish that the business carried on by the receiver is interstate in its character, and of such a nature as not to be properly susceptible of or subject to local state regulations such as the 28 cent rate order, we have the statement of the Public Utili-

ties Commission itself in its opinion of July, 1915, which opinion concluded with the following language:

> 'It developed upon the hearing that more than half the natural gas supplied and marketed by complainants is sold in the State of Missouri. It is conveyed by means of pipe lines passing through Kansas City, St. Joseph, and other cities in our sister state. It would be manifestly unfair to permit complainants to advance the price of gas of their Kansas patrons, unless a corresponding increase were made to consumers in Missouri. It is conceded that an advance in Kansas, without a similar one in Missouri, would be unavailing for the purposes contemplated by complainants, and they do not desire any advance in Kansas, except as it may be simultaneous with a corresponding one in Missouri. This Commission, therefore awaits the pleasure and action of the rate-regulating body or bodies of Missouri having jurisdiction of the subject matter, and if in that state proper and necessary orders be issued establishing a schedule of rates as herein outlined, an order, effective if possible, simultaneously, will be issued by this Commission, in accordance with the views herein expressed.'

"The same conclusion was apparently reached by the Supreme Court of the State of Kansas, in State ex rel. vs. Flannelly, 96 Kan., 372, 152 Pac., 22, when in its opinion the Court said:

> 'The last question for our consideration concerns the legality of the rates, both those that are in existence at the present time and those

named in the opinion of the Commission. The Commission finds that, where the net price of gas to consumers is now 25 cents per thousand cubic feet, the rate should be increased to 28 cents. This, in effect, is a finding that the rates now in existence are not compensatory. It then became the duty of the Commision to fix compensatory rates, taking into consideration the gas sold in Missouri, assuming that compensatory rates will be fixed in Missouri. However, we may say that obedience to law in making rates in Kansas cannot legally be made dependent on obedience to the same law in Missouri.'

"The state of Kansas itself has thus realized that the business carried on by the receiver is of such character that the fixing of rates thereon is not a merely local matter. Furthermore, control over the supply of gas is not within the power of the Commission. The supply is an important element, however, in the fixing of rates. This state of affairs militates strongly against a conclusion that the business is of such character as to be properly subject to state control in the matter of rates. The case of Manufacturer's Heat & Light Company vs. Ott. (D. C.), 215 Fed., 940, relied upon by the defendant Commissions must be disregarded, if it conflicts with the decisions above cited, for these decisions are binding upon this court. It may, however, in my opinion, be distinguished by the fact that the great bulk of the business transactions considered in that case were concededly intrastate, and the portion claimed to be interstate of very minor importance; whereas in the instant case exactly the reverse of those facts is true.

It is true that about 6 per cent. of the gas delivered by the receiver in Kansas is produced in Kansas, but this cannot alter the general situation. Where a substantial part of a business is interstate commerce, the imposition of burdens and regulations thereon by state action cannot be justified by the fact that a portion of the business thus sought to be controlled and regulated is intrastate. See Leloup vs. Port of Mobbile, 127 U. S., 64, 647, 8 Sup Ct., 1383, 32 L. Ed., 311, Norfolk Ry. vs. Pennsylvania 136 U. S., 114-119, 10 Sup. Ct., 958, 34 L. Ed., 394, Crutcher vs. Kentucky, 41 U. S., 47, 59, 11 Sup. Ct., 851, 35 L. Ed., 649, Galveston Ry. vs. Texas, 210 U. S. 217, 228, 28 Sup. Ct., 638. 52 L. Ed., 1031, W. U. Co. vs. Kansas, 216 U. S., 1, 30 Sup. Ct., 190, 54 L. Ed., 355, Williams vs. Talladega, 226 U. S., 404, 419, 33 Sup. Ct., 116, 57 L. Ed., 275. It is claimed by the defendant Commission that the inaction of Congress, in view of the character of the business, is an indication that it was intended that state action, such as is involved in the instant case, might properly be exercised. Here again it is not always easy to draw a hard and fast line between cases in which, in the absence of congressional action, the state may properly act, and those in which it may not act. In Minnesota Rate Cases, 230 U. S., 352, 33 Sup. Ct., 729, 57 L. Ed., 1511, 48 L. R. A. (N. S.), 1151, Ann. Cas., 1916A, 18, the court in reference to this subject used the following language:

> 'The principle which determines this classification underlies the doctrine that the state

> cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national Legislature constitutionally ordains.'

"Even in the absence of congressional action, the exercise of state authority over interstate commerce does not extend to the fixing of rates for the transportation of goods, in such commerce. This doctrine was announced before the establishment of the Interstate Commerce Commission, and applies not merely to cases where that Commission has jurisdiction in reference to rates but also in the absence of such jurisdiction. Wabash Ry. Co. vs. Ill., 118 U. S., 557, 7 Sup. Ct., 4, 30 L. Ed., 244, L. N. R. vs. Eubank, 184 U. S., 27, 22 Sup. Ct., 277, 46 L. Ed., 416, Ohio Ry. Co. vs. Worthington, 225 U. S., 101. 32 Sup. Ct., 653, 56 L. Ed., 1004. In the case of Railroad Commission of Ohio vs. Worthington 225 U. S., 101, 32 Sup. Ct., 653, 56 L. Ed., 1004, the following language is used:

> 'It is not necessary to review the cases in this court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the Constitution of the United States, nor to do more than reaffirm the equally well settled proposition that over interstate commerce transportation rates the states has no juridiction, and that an attempt to regulate

such rates by the state or under its authority is void.'

"The conclusion reached, therefore, is that the interstate commerce in which the receiver is engaged is not of a local nature, and is not, even in the absence of action by congress, subject to burdens or regulations imposed by state action, which are substantial rather than incidental in their nature."

POINT IV.

The agent's contract with the Grand Union Tea Company constituted interstate commerce. This contract was made when accepted at the New York office.

We come now to the contention that the contract which the plaintiff in error had with the Grand Union Tea Company constituted interstate commerce and could not be unlawfully burdened. That contract, which appears in the record (page 30) constituting Exhibit 1, state in the 13th clause as follows:

> "This contract is deemed to be made when accepted and signed by the Grand Union Tea Company at its office, 68 Jay Street, Brooklyn, New York."

It is provided that the plaintiff-in-error entered the employment of the company as its salesman or solicitor to take orders and deliver the merchandise of the company; that the title to the goods re-

mained in the company, and provided for the general conduct of the business. The plaintiff-in-error was a resident of the State of Michigan; the Grand Union Tea Company is a corporation organized under the laws of the State of New Jersey and having its headquarters in the Borough of Brooklyn, City and State of New York.

The Court should consider and give due weight to this contract as a basis for holding that the whole course of business was interstate commerce. The fact that the contract was between citizens of different States and was made and accepted in New York with a resident of Michigan *rounds out and completes the general idea of interstate commerce.*

We should really start with this contract as the foundation of the whole course of business and then build up from it the custom concerning the taking of orders, their transmission to the store, the ordering by the store of goods from headquarters, the constantly recurring orders of the agents; the continual transit of the goods from the headquarters in Brooklyn, through the store to the agents and finally to the consumers. When we realize that this is a constantly recurring current of trade and when we appreciate that the goods are outside the State when the orders are taken and moved into the State as a result of those orders, we submit that the Court should have no difficulty in determining that the business of the Grand Union Tea Company is interstate commerce.

Contracts which have been held to be interstate commerce may be found in the following citations:

7 Cyc., 484, as to occupations;

7 Cyc., 441, and cases cited in note 56 on page 442.

A representative example of an agent working for a foreign principal is fully illustrated in the case of International Text Book Company vs. Pigg, 217 U. S., 91, in which it appeared that a foreign corporation engaged in teaching by correspondence and which continuously had an agent in the State securing scholars and collecting and forwarding money received from them was doing an interstate business.

POINT V.

The license fee required by the ordinance in question is exorbitant and prohibitive.

The ordinance provides in section 2 that the license fee for canvassing for the sale of property on subscription is $1.00 each day, which means a $365.00 license fee per annum.

The brief filed by the attorney-general when this case was before the Supreme Court of Michigan did not disclose whether the ordinance was relied upon as a taxing measure or as a police regulation.

It is quite apparent that it cannot be justified as a taxing measure because it would be a burden upon interstate commerce, that is to say, a burden upon the right or privilege of soliciting orders for future delivery. It would be a tax on an occupation. It is not claimed to be a tax upon property and certainly nothing in the ordinance would indicate that it was.

The respondent will undoubtedly attempt to justify it as a police regulation. As a police regulation, the fee is so exorbitant as to be beyond the requirements of inspection and regulation and is therefore,

void because unreasonable. Many cases have been decided as to what extent interstate commerce is subject to and may be regulated under the police power. Only two will be quoted.

Crutcher vs. Kentuck, 141 U. S., 47-58, where Mr. Justice Bradley, said:

> "As was said by Mr. Justice Lamar in the case last cited (N. & W. R. R. Co. vs. Pa., 136 U. S., 114, 118) 'It is well settled by numerous decisions of this court that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce or impose any burdens upon such commerce within its limits. We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.' *Pickard* vs. *Pullman Southern Car Co.*, 117 U. S., 34; *Robbins* vs. *Shelby County Taxing Dist.*, 120 U. S., 489; *Leloup* vs. *Mobile*, 127 U. S., 640; *Asher* vs. *Texas*, 128 U. S. 129; *Stoutenburgh* vs. *Hennick*, 129 U. S., 141; *McCall* vs. *California*, 136 U. S., 104; *Norfork & W. R. R. Co.* vs. *Pa.*, 136 U. S., 114."

Adams Express Company vs. New York, 232 U. S., 14, 31:

> "It is insisted that under the authority of the State the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly, the exer-

tion of the power essential to assure needed protection to the community may extend incidently to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. *Smith* vs. *Ala.*, 124 U. S., 465; *Hennington* vs. *Ga.*, 163 U. S., 299; *N. Y., N. H. & H. R. R. Co.* vs. *N. Y.*, 165 U. S., 628; *Lake Shore & M. S. Ry.* vs. *Ohio*, 173 U. S., 285. It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the federal constitution. The local police regulations cannot go so far as to deny the right to engage in interstate commerce or to treat it as a local privilege and prohibit its exercise in the absence of local license. *Crutcher* vs. *Kentucky*, 141 U, S., 47, 58; *Robbins* vs. *Shelby Taxing District*, 120 U. S., 489; *Leloup* vs. *Mobile*, 127 U. S., 640; 645; *Stoutenburgh vs Hennick*, 129 U. S., 141; 148; *Rearick* vs. *Pennsylvania*, 203 U. S., 507; *International Text Book Co.* vs. *Pigg*, 217 U. S., 109; *Oklahoma* vs. *Kansas Natural Gas Co.*, 221 U. S., 229, 260; *Buck Stove Co.* vs. *Vickers*, 226 U. S., 205; *Crenshaw* vs. *Arkansas*, 227 U. S., 389; *Minn. Rate Cases*, 230 U. S., 352, 401."

POINT VI.

Where one has been convicted for violating a city ordinance which is unconstitutional as applied to the act committed, the conviction cannot be sustained because there was proof of a different act with which he was not charged, as conviction for the latter would be condemnation without hearing, which would be denial of due process of law.

This point is copied almost verbatim from the headnote to *Stewart* vs. *Michigan*, 232 U. S., 665.

We intend to show that that case is absolutely parallel with the case at bar.

In the Stewart case the sole basis of the prosecution was "the sales made from the car as the result of the orders solicited." He was convicted upon two grounds:

1st.—The sales made from the car as the result of orders solicited, and

2nd.—Sales made direct from the car without previous order.

The United States Supreme Court held that the *first ground* constituted interstate commerce as admitted upon the argument, and that defendant had not been charged or prosecuted on the second ground. The conviction on the second ground was, therefore, a condemnation without hearing and a denial of due process of law.

Before making the comparison between the Stewart case and the present case, let us examine the case at bar carefully with special reference to

1st.—the ordinance,
2nd.—the complaint,
3rd.—the evidence.

The **ordinance** made it unlawful to conduct *either* of the two following separate businesses without a license:

First, to engage in peddling any goods, wares or merchandise on the public streets, from house to house or from vehicles or booths within the corporate limits of the Village of Munising.

The license fees for these businesses were:

For the sale of merchandise or provisions from house to house, two dollars for each day.

For canvassing for the sale of goods and chattels from vehicles and booths, two dollars for each day.

Second, to canvass from house to house, for the sale of property, *on subscription.*

The license fee for this business was: For canvassing for the sale of property *on subscription,* one dollar for each day (Record, p. 34).

The prosecution has never contended that the defendant canvassed for the sale of property *on subscription.* No evidence was offered that the customers of the defendant *subscribed* their orders. In fact the decisions of the lower courts were not based on this ground. *So that the complaint, prosecution and decisions must stand if at all upon the first business mentioned above, namely, PEDDLING.*

Now, let us look at the **complaint.** The defendant is charged with having committed the following acts:

> "On the 8th day of July, A. D. 1915, * * * and on divers other days between last mentioned date and the first day of May, 1915, did go about the streets of the City of Munising * * * and did engage in peddling goods, wares and merchandise from house to house *and* did canvass *and* take orders from house to house in said City of Munising for the sale of goods, wares and merchandise, to wit: Tea, coffee, spices and other goods and wares, and did so go about said business and the taking of said orders from house to house in said City of Munising with a horse and wagon *and* on foot."

This is not the allegation of a single act, but collectively a series of acts occurring during a period between May 1 and July 8, 1915. The acts are alleged to consist:

1st.—of peddling,

2nd.—of canvassing,

3rd.—of taking orders with a horse and wagon,

4th.—taking orders on foot.

It is quite evident that it was the general character of the business that was attacked and not a single transaction.

He was not accused of peddling alone. He was not accused of canvassing alone. He was not accused of taking orders with a horse and wagon, alone. He was not accused of taking orders on foot alone.

The complaint specifically mentions each of those separate and distinct methods of business and says that the defendant did all of them without a license during a certain period.

Certainly in alleging a violation of all of them collectively during a certain period, the prosecutor intended to charge a violation of the ordinance by the conduct of the defendant's business *during* that time.

The **evidence** *clinches* this contention.

Mr. Watters, the defendant, was the only witness for the prosecution. He was examined as to his general method of conducting business. He testified:

> "My method of selling goods is that I take orders one month and deliver the next. * * * My method of selling goods is to go from house to house," etc. (Record, page 6).

He was questioned and answered concerning his general method of conducting business and particularly as to what he was doing on July 8, 1915. He testified that on that day he both delivered goods and solicited orders, showing that it was the general character of his business that the prosecutor sought to get in evidence in order to prove the allegations of the complaint which charged the conduct of the four separate and distinct businesses above mentioned.

Not a word was asked or answered about soliciting orders on June 6th or 7th. Not a word was asked or answered about two jars of toilet cream or any other merchandise being within the State of Michigan on June 6th or 7th.

Such a theory or basis of prosecution apparently never occurred to the prosecutor in the examination of his only witness. Certainly it was not disclosed in his direct examination.

The prosecutor rested and closed his case without proving or referring to the sole ground upon which the Circuit Court and the Supreme Court based their decisions.

Then the defendant swore Mr. Kay, the manager of the Ishpeming store. He testified on direct examination that as he "remembered it," Watters solicited the orders on June 6th or 7th which he delivered July 8th. This was clearly hearsay testimony and the prosecutor did not even cross examine him as to the date Watters solicited the orders which he delivered on July 8th.

Yet that very soliciting on June 6th or June 7th was the sole basis for the decision of the lower courts.

The Circuit Court said (Record, page 24):

> "It appears, however that the respondent took orders for some goods which were within the state when the order was taken, which had been shipped into the state without previous

order therefor, and which were being held in the state for the purpose of sale to the public."

Not a word is said by the Court about the delivery on July 8th. It is the soliciting on June 6th or 7th that the Court says was a crime.

Again the Court said (Record, page 24):

"In this state the word 'peddler' includes those who go from house to house taking orders for future delivery."

This, we submit, shows conclusively that the Court based its opinion on the soliciting on June 6th or 7th and not the delivery on July 8th.

Now, let us go back to the testimony again. Even on cross examination, Mr. Kay, the defendant's witness, was not asked about the two jars of toilet cream being within the state on June 6th or 7th. *That fact was first brought out on his re-direct examination.* It was no part of the prosecutor's case; **the defendant was not charged with that fact as a violation and yet he was convicted solely because of it.** *It was a different act with which he had not been charged.* That is just like the Stewart case.

The defendant had a right to rely upon the complaint. His obligation was to answer it as drawn. As we have seen (supra) the ordinance applied to the defendant only so far as he was "peddling" not "canvassing on subscription."

The complaint recognized that "peddling" was one thing; "canvassing" was another;; "taking orders with a horse and wagon" still another, and finally "taking orders on foot" a different one.

It is just this distinction between peddling and taking orders for future delivery that is important.

To canvass is no crime under the ordinance except when done upon subscription.

To take orders with a horse and wagon or on foot is no crime under the ordinance. Such a business is not mentioned in the ordinance unless it can be included in the word "peddling." The complaint does not so include it because it charges "peddling *and* taking orders with a horse and wagon." It mentions both. If one included the other, why mention both?

If peddling was to include taking orders for future delivery, then the complaint should have been so drawn, the prosecution should have been so conducted, the issue should have been clearly framed so that the defendant could have met it.

Yet the Circuit Court and the Supreme Court based their decisions solely on the ground that the soliciting of orders for future delivery was peddling and convicted the defendant upon a theory which he had no opportunity of arguing, explaining or meeting.

This is not a case where the ordinance defines peddling to include the taking of orders for future delivery. There is no statute in Michigan so defining the word.

The distinction between peddling and taking orders for future delivery was not before the court at any time. Yet the plaintiff-in-error stands convicted of a crime and condemned without a hearing on the question and without due process of law.

TO SUMMARIZE:

The defendant was *charged* with violating the ordinance because of his acts constituting his general method of business between May 1st and July 8th, and particularly his acts on July 8th, which consisted of delivering goods previously ordered and soliciting orders for the future delivery of goods.

The defendant was *convicted* for soliciting orders on June 6th and 7th for goods that were within the state at the time, an act with which he was not charged.

The lower courts properly held that the soliciting on July 8th and the general conduct of the business under the circumstances was interstate commerce.

The defendant was condemned without a hearing for the following acts:

1st. For simply *delivering* on July 8th two jars of toilet cream.

If that act had been charged, the defendant would have argued upon the hearing that the DELIVERY OF GOODS ALONE, unassociated with the method by which it was solicited, was not a crime under the ordinance, was not charged in the complaint, and for which the defendant was not prosecuted.

He would also have earnestly contended that one delivery of merchandise previously ordered was not peddling.

If the act had been charged as connected with the soliciting on June 6th or 7th and as the result

of such solicitation, then the defendant would have argued upon the hearing that the taking of an order for the future delivery of goods either by horse and wagon or on foot was not prohibited by the ordinance specifically and was not included in the definition of the word "peddling" as used in the ordinance and in fact was distinguished by the allegations of the complaint.

2nd. For soliciting an order on June 6th or 7th considered separate and distinct from the general conduct of the business covering the period from May 1st to July 8th.

The defendant was, therefore, convicted without due process of law for acts with which he was not charged. The conviction cannot, therefore, be sustained as it was a condemnation without a hearing which was a denial of due process of law.

The similarity to the Stewart case in this respect must be quite apparent.

In the case at bar the lower courts distinctly held that the general course of business of the plaintiff-in-error and his employer, the Grand Union Tea Company, was interstate commerce. The same was true in the Stewart case.

Also, like the Stewart case, the present plaintiff-in-error was not charged or prosecuted for the act for which he was convicted, namely, the delivery of merchandise alone, on July 8, or the soliciting of orders on June 6 or 7 for merchandise at that time within the state. The conviction, therefore, was a condemnation without a hearing and a denial of due process of law.

POINT VII.

The judgment of the Supreme Court of the State of Michigan should be reversed, with costs.

Respectfully submitted,

MAURICE B. DEAN,
Attorney for Plaintiff-in-Error,
Office and P. O. Address,
120 Broadway,
New York City.

THE case is stated in the opinion.

Mr. Maurice B. Dean for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was complained of for having engaged in peddling goods and having canvassed and taken orders from house to house for the sale of goods in the city of Munising, Michigan, without having received a license as required by a city ordinance. It may be assumed that much the greater part of his business was interstate commerce and free from any obligation that the ordinance imposed. But in the course of his business he did sell two cans of toilet cream that were at rest in the State before the sale, and it is admitted that this transaction was not protected from state legislation. *Bacon* v. *Illinois*, 227 U. S. 504. On this ground the Supreme Court of the State sustained a conviction and fine. 192 Michigan, 462. The ordinance makes it unlawful to engage in peddling any goods or to canvass from house to house for the sale of property on subscription without a license, which may be had on payment of specified fees. The plaintiff in error argues that the application of this law should be determined by the general course of business, not by an isolated transaction, and the argument has force. It depends, however, on the construction of the ordinance, and as the State Court has construed it to apply to and forbid the act proved, the judgment must be affirmed.

Judgment affirmed.

WATTERS *v.* PEOPLE OF THE STATE OF MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 58. Submitted November 19, 1918.—Decided December 9, 1918.

Whether a city ordinance regulating peddling and canvassing from house to house for sale of property on subscription, is confined to a general course of such business or applies also to isolated transactions, is a local question determinable by the state court.

192 Michigan, 462, affirmed.